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FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

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A

MANUAL OF THE LAW

RELATING TO THE

OFFICE OF TRUSTEE;

WITH AN

Appendix of Statutes, Forms, etc.

BY

R. DENNY URLIN, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

THE THIRD EDITION,

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INSCRIBED (BY PERMISSION) TO
THE RIGHT HON.
JAMES ANTHONY LAWSON, LL.D., Q.C., M.P.,
LATELY HER MAJESTY'S ATTORNEY-GENERAL FOR IRELAND,
AS
A SLIGHT TRIBUTE
OF ADMIRATION
FOR HIGH FORENSIC AND GENERAL ATTAINMENTS,
AND OF GRATITUDE
FOR MUCH PERSONAL KINDNESS.

Trinity Term, 1868.

PREFACE TO THE THIRD EDITION.

LITTLE apology was required for the first publication of this book; for at that time no work on the same branch of law had appeared for many years; and the “Trustee Acts” and “Trustee Relief Acts,” and many important decisions, had altered the law very much, and had rendered even the comprehensive work of Mr. Lewin “on Trusts” of comparatively little value. That standard textbook has since been more than once carefully re-edited. It is, however, supposed that a much smaller volume, containing a summary rather than a full exposition, of the Law of Trustees, may still be found useful, especially to solicitors and students.

The Reports contain more than 5,400 decisions directly or indirectly affecting this branch of law. Only a selection from them can be brought within the narrow limits of this book; but it has been sought to refer to the more recent and more im-

portant of them, and especially to those in which the earlier cases are cited.

The present edition contains not only the Trustee and Trustee Relief Acts, but also such portions of later statutes as affect Trustees.

A chapter has been added on Charitable and Religious Trusts, which may, possibly, be of service to those who do not possess Mr. Tudor's work on Charitable Trusts. As the Charitable Trusts Acts have also been lately edited by Messrs. Cooke and Harwood (of the Charity Commission) it is considered unnecessary to include those Acts in the Appendix of Statutes.

TRINITY TERM, 1868.

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ADDENDA.



Page 16, note (*k*), refer to—*Isaaeson v. Harwood*, L. R. 3 Ch. App. 225.

- ,, 49, note (*s*), refer to—*Gunson v. Simpson*, L. R. 5 Eq. 332.
- ,, 60,—In *Muskerry v. Sheffington* (May, 1868), the House of Lords reversed a decree removing a trustee who was able and willing to remain in the trust.
- ,, 92, refer to—*Brittlebank v. Goodwin*, L. R. 5 Eq. 545.
- ,, 98 and 107, notes, as to rate of interest in *Ireland*, refer to—*the new Order*, see p. 358.
- ,, 115, the word “not,” at the end of line 9, should be struck out. *Grayburn v. Clarkson* affirmed on appeal, W. N. 1868, p. 132.
- ,, 142, omit—*Cresswell v. Dewell*: it rightly appears on p. 147.
- ,, 144, note (*f*)—the rule established *In re Suggitt's trusts*, L. R. 3 Ch. App. 215.
- ,, 157,—*Lloyd v. Banks* reversed on appeal, W. N. 1868, p. 166.
- ,, 164, refer to—*In re Webb*, L. R. 2 Eq. 456.
- ,, 235,—*Jones v. Badley* reversed on appeal; but the rule as stated was confirmed, L. R. 3 Ch. App. 362.
- ,, 278,—*Talbot v. Marshfield* varied on appeal, by not fixing the trustees with the plaintiff's costs subsequent to the hearing, W. N. 1868, p. 167.

THE
OFFICE OF TRUSTEE.

CHAPTER I.

INTRODUCTORY.—OF THE CREATION AND NATURE OF
TRUSTS.—ACCEPTANCE OF TRUST.—DISCLAIMER.—
DEVOLUTION OF TRUST.

THE LAW RELATING TO TRUSTEES, like almost all other branches of our law possessed of any scientific interest, has its origin in the Roman Law. And, like many of our own most useful laws, it began with an evasion of, or attempt to remedy the defects in, a pre-existing jurisprudence. In order that his son under disability might enjoy the property, which might otherwise pass into other hands, the Roman testator made it over to a *heres-fiduciarius* [trustee], who was to be the legal owner, but was to be accountable to the *fidei-commissarius* [beneficiary or *cestuique trust*]. This relation was not recognized before many frauds had been committed; and Augustus at length recognized *fidei-commissa* [trusts]; and appointed a

Origin of
trusts under
Roman law.

prætor-commissarius, whose duty it was to enforce the claims of beneficiaries.

Definition.

A trust, in the modern acceptance of the term, has been defined as “an obligation upon a person arising out of a confidence reposed in him, to apply property faithfully, and according to such confidence” (a). This definition, although more clear and concise than others that have been given, must be narrowed before it becomes applicable to a system of law which does not permit Trusts to be controlled by the ordinary courts of justice. The definition, to be complete, must refer to the remedy open to the person *beneficially entitled* [the beneficiary or *cestuique trust*] against the trustee or person who is *at law* looked upon as the owner of the trust property. The “obligation” imposed on the conscience of a trustee is one which cannot, in this country, be enforced without the aid of a Court of Equity. A trustee may therefore be described as a person who is under an obligation, enforceable in equity, to apply property for the benefit of another.

The law relating to the duties and liabilities of trustees is not found on the pages of the statute book, nor has it ever been expounded by the Judges of the Law Courts. It is chiefly to be collected from various decisions of Judges of the Court of Chancery. A trust is, in the language of the old law writers, “the creature of Equity;” and, although unrecognized by

(a) Stair, Instit. Laws of Scotland, B. 4, tit. 6.

the legislature except in a few recent instances, trusts have become the *bases* of all family arrangements respecting real or personal property throughout the kingdom.

There are various modes of classifying trusts. They may, as regards their nature, be divided into—

Classification of trusts.
As to their nature.

(1) **PASSIVE TRUSTS.**—As where property is vested in one person simply for the benefit of another. The duties of the trustee may, in this case, be summed up in a sentence. He is bound to convey or make over to the *cestuique trust*, or otherwise to dispose of the trust property as he may be directed by him.

(2) **ACTIVE TRUSTS.**—Where property is vested in the trustee for certain specified purposes. He is here charged with the performance of such active duties as may be expressed in the instrument creating the trust, or may, according to the rules of Equity, be thrown upon him in consequence of his acceptance of it.

Trusts may, as regards their object, be divided into—

As to their object.

(1) **PUBLIC TRUSTS.**—Created for the benefit of the public, or of some section of the public: here the individuals to be benefited are not specified by the

donor, and the duration of the trust remains uncontrolled by the law. These are more commonly styled “Charitable Trusts.”

(2) PRIVATE TRUSTS.—Or those generally created by settlement, will, or other instrument for family purposes. The author of the trust is here supposed to take a personal interest in its objects; and the duration of such trusts is in general limited by the rules of law, as well as by enactment of the legislature (*b*).

The Rules and Maxims of Equity to be observed by trustees in the performance of their duties as such, will, for the most part, apply to all cases, however the trusteeship arise, and whatever may be its object.

Creation of
trusts

—may be by
parol.

ALTHOUGH it is usual to find the office of trustee created, and its duties pointed out by an instrument, prepared with more or less formality, it must not be forgotten that a trust may be legally created by word of mouth, nor will the Courts of Equity omit to

(*b*) Trusts are again frequently divided into such as arise by *express declaration*, and such as arise by *operation* or *construction* of law. Trusteeship in practice seldom arises without express declaration; and the rules relating to trusts otherwise created do not call for mention in a work professedly dealing with the *Office of Trustee*, as distinguished from the subject of *Trusts*.

enforce its fulfilment by reason of any informality in its origin. It is, indeed, required by the Statute of Frauds (*c*) that "every trust of *lands, tenements, and hereditaments* shall be manifested and proved by *some writing*, signed by the party who is by law entitled to declare such trusts, or by his last will in writing, or else they shall be utterly void and of none effect." This enactment does not require that such trusts should be *created* by writing, but that they should be *evidenced* by writing; and "it must be proved *in toto* not only that there was a trust, but what it was" (*d*). This has been held to extend to copyhold property, as well as to chattels real (*e*). Trusts of all other descriptions of property may still be created by *parol*; but "extremely strong evidence of its terms" will be required before the Court will carry out a trust created by oral expression (*f*). It will be observed that "some writing" only is required by the statute, so that however desirable it may be to evidence a trust by deed, that formality is in no case *essential*.

Trusteeship practically arises in very few instances otherwise than under the provisions of an

Trusteeship
—usually
created by
deed or will.

(*e*) 29 Car. 2, cap. 3, see. 7.

(*d*) Per Lord Alvanley in *Forster v. Hale*, 3 Ves. 696: and see *Smith v. Matthews*, 3 De G. F. & J. 139; 9 W. R. 644.

(*e*) Chattels personal are not within this enactment. *M'Fadden v. Jenkyns*, 1 Ha. 461; 1 Ph. 157: *Grant v. Grant*, 34 Beav. 623.

(*f*) Wood, V.-C., in *Paterson v. Murphy*, 11 Ha. 88, 91; and see cases cited in *Drury Rep. t. Napier*, 608, et seq.

Requisites. agreement, a deed, or a will, so framed as to satisfy at all events the three requirements for the creation of every valid trust—viz., sufficient words to raise it, a definite subject, and a certain or ascertained object (*g*). There is little probability of any of these requisites being overlooked in any document prepared by a legal adviser. With regard to wills, these instruments being frequently prepared in a hasty and informal manner by the testators themselves, it happens sometimes that one or other of the requisites is found to be omitted in the preparation of the instrument.

(1) Words occurring in a will which are uncertain as to the obligation intended to be imposed on the trustee, and instead of conveying a clear wish or direction, merely expressing a vague *expectation* or a wish which the Court cannot give effect to, may fail to create a trust (*h*).

(2) The subject-matter may be so indistinctly pointed out, as that the intended trust may be impossible of execution (*i*).

(3) The object of the trust may not be indicated with sufficient clearness. Property devised in this

(*g*) *Crunwys v. Colman*, 9 Ves. 323 : *Wright v. Atkyns*, 1 T. & R. 143 : see *Palmer v. Simmonds*, 2 Drew. 225 : *Fox v. Fox*, 27 Beav. 301 : *Huskisson v. Bridge*, 4 De G. & Sm. 245 : Story, Eq. Jur. § 964 (2nd ed.).

(*h*) *Graves v. Graves*, 13 Ir. Ch. Rep. 182 : see *Lefroy v. Flood*, 4 Ir. Ch. Rep. 1 : *Eaton v. Watts*, 16 L. T. Rep. N. S. 311.

(*i*) *Malim v. Keighley*, 2 Ves. 333, 529 : *Knight v. Knight*, 11 Cl. & F. 513.

manner is held to revert to the donor, and to form part of his undevised estate (*k*).

A prudent trustee will not attempt to act in the administration of the trust while a reasonable doubt remains as to the intentions of the creator of the trust in either of the foregoing particulars. He will of course take adequate legal advice on the subject, as without that he cannot form any correct idea as to the proper interpretation to be given to the technical words made use of by the testator. If the result is still to leave doubt on the subject, a trustee cannot be advised to act without the protection of the Court of Chancery, which will undertake the solution of the difficulty, and in so doing of course afford him complete indemnity against all future dangers.

This ready interposition in trust affairs arises from two fundamental maxims of the Court of Chancery—viz., “**THAT EVERY TRUST IS TO BE FULFILLED ACCORDING TO THE INTENTIONS OF ITS CREATOR,**” and “**THAT NO TRUST SHALL BE PERMITTED TO FAIL FOR WANT OF A TRUSTEE.**” It matters not whether the trustee originally nominated refuse to act, or after acting for a time desire to resign his charge into the hands of the Court—in any and every case the Court will assume the execution of the trust; and although it may discourage groundless applications of the trustee by exercising a discretion as to *costs* (*l*), it

Court of
Chancery
will carry
trusts into
execution.

(*k*) *Stubbs v. Sargon*, 3 M. & C. 507: Story, Eq. Jur. § 979 a.
(2nd ed.): *Green v. Marsden*, 1 Drew. 646.

(*l*) See Chapter X.—“Costs of Trustees.”

will never refuse to carry the trust itself into execution (*m*).

It need scarcely be added that in carrying out a trust the Court will adhere to all the principles of law regulating the disposition of property. Real property (for example) cannot be vested in trust for an alien, or for a corporation in contravention of the Mortmain Acts. Nor can trusts be made use of for the purpose of evading the rules against perpetuities, or of evading any other rule established in furtherance of the public interests, or based upon what is called “The Policy of the Law.”

In carrying out a trust a Court of Equity rarely enters into the question of whether it be founded on a valuable consideration or not. The question will be, whether the relation of trustee and *cestuique trust* has been perfectly established? If the legal ownership of or power over the trust property be clearly existing in one person, and the beneficial interest as clearly vested in another, the Court will enforce the trust, though it be in its origin purely *voluntary*. If, on the other hand, either of these requisites be wanting,—if the legal transfer be not made,—or the trust be not fully declared—the relationship of trustee and *cestuique trust* is not then considered as established so as to warrant the Court

(*m*) Jurisdiction over trusts, where the subject matter is under 500*l.*, is conferred on the County Courts. Stat. 28 & 29 Vict. c. 99, s. 1: and this enactment applies to constructive trusts, *Clayton v. Renton*, L. Rep. 4 Eq. 159.

In conformity with the ordinary principles of law.

Consideration to support a trust.

Voluntary trusts supported, if perfectly created.

in interfering. The declaration of a trust *by the trustee* is of course sufficient to prevent the transaction from being regarded as merely executory, and will be for all purposes a sufficient declaration of trust (*n*).

Where a trust is voluntary, or is created for no valuable consideration, and more particularly when unaccompanied by transfer, or change of possession, of the trust property, it is important for the trustee to be assured that the declaration of trust is complete. A mere agreement made, or intention expressed to create a trust, leaving something to be done to perfect the declaration of trust, will not be enforced (*o*). In a late case V.-C. Wood refused to enforce a trust because the intention of the parties was unsettled — “In such a case the test is simply this: whether there was a clear indication of a definite intention to part with the property in favour of the person named, or whether there remained something to be done by a

(*n*) *Exp. Pye*, 18 Ves. 149 : *Edwards v. Jones*, 1 M. & C. 264 : *Meek v. Kettlenwell*, 1 Ha. 472. Where a sole trustee having made away with certain trust funds, deposited a policy of insurance among his papers, together with a memorandum declaring that the policy was to be applied for the benefit of the *cestuisque trusts*; and afterwards the trustee (Sir J. D. Paul) became bankrupt, and the security was claimed by the assignees in bankruptcy; Wood, V.-C., held that the trust was sufficiently declared by the memorandum, and directed that the policy should be handed over to the new trustees of the settlement. *Re Bankhead*, 2 Kay & J. 560.

(*o*) *Scales v. Maude*, 6 D. M. & G. 43 ; 1 Jur. N. S. 1147 : *Ellison v. Ellison*, 6 Ves. 662.

subsequent act for the purpose of carrying out that intention" (*p*). A trust, although voluntary in its origin, has always been regarded as perfectly created where there has been a legal transfer of the stock, &c.; but it was doubted whether the Court would enforce a trust of this nature where a bond, or other property not capable of transfer at law, formed the subject of the trust. There is, however, reason to believe that no such distinction will prevail, and the tenor of the later decisions seems to be, that whatever the nature of the property may be, a trust once perfectly declared will be enforced in equity (*q*). An equitable owner of property, the legal estate of which is in a trustee, may undoubtedly assign his interest without consideration (*r*); and such gift will be valid and binding on him, even though no notice of the assignment be given to the trustee (*s*).

27 Eliz. c. 4.

A voluntary settlement of land, by way of trust, differs materially from a similar settlement of personal property, inasmuch as it can be defeated, under

(*p*) *Forbes v. Forbes*, 3 Jur. N. S. 1206; 6 W. R. 92.

(*q*) *Kekewich v. Manning*, 1 D. M. & G. 187: *Wilcocks v. Hannington*, 5 Ir. Ch. Rep. 45: *Grant v. Grant*, 34 Beav. 623. A *dictum* in *Scales v. Maude*, 6 D. M. & G. 51, that a declaration of trust in favour of a volunteer is invalid, is not regarded as good law. *Jones v. Lock*, L. R. 1 Ch. App. 25. The cases are collected in the notes to *Ellison v. Ellison*, 1 Le. Ca. Eq.

(*r*) *Sloane v. Cadogan*, App. to Vend. & Purch.: *Voyles v. Hughes*, 2 Sm. & G. 18: *Re Way's Trust*, 2 De G. Jo. & S. 365.

(*s*) *Donaldson v. Donaldson*, 1 Kay, 711.

stat. 27 Eliz. c. 4, by a subsequent conveyance for value to a purchaser. Nor has the person in whose favour the trust was created any remedy whatever, either against the estate or against the settlor (*t*). It is immaterial that the purchaser has notice of the voluntary settlement.

Voluntary settlements either of real or personal estate, unless made "on good consideration and *bonâ fide*," are also liable to be impeached by creditors, under stat. 13 Eliz. c. 5; but this statute will not affect deeds executed by solvent persons, and can only be taken advantage of by creditors who were such at the time of the execution of the settlement (*u*).

All persons who may become owners of property may become trustees of that property, either by operation of law, or by express declaration; and the trust attaches to the property into whatever hands it may come by legal transfer or devolution. But although all persons capable of holding property in their own right are also capable of holding in trust for another, it by no means follows that careful discrimination in the choice of trustees is unnecessary.

It may be well to consider, first, what classes of persons are not eligible for the office of trustee; and afterwards, what persons ought to be selected.

(*t*) *Pulvertoft v. Pulvertoft*, 18 Ves. 91, and cases there cited. See an elaborate note on these Acts 3 Davidson's Pr. (2nd ed.) 841.

(*u*) *Barrack v. M' Culloch*, 3 Kay & J. 110: *French v. French*, 6 De G. M. & G. 95, and cases there cited: and see *Smith v. Cherrill*, L. Rep. 4 Eq. 390.

All owners
may be
owners in
trust.

Who are
ineligible.

The Crown.

The Crown may perhaps be trustee for the subject; but no mode has been discovered of enforcing such a trust (*x*), and a petition of right (now regulated by stat. 23 & 24 Vict. c. 34, Sir W. Bovill's Act) is the only course that could be suggested to the *cestuique trust*. A corporation may administer, and may be compelled to administer a trust (*y*) ; but the licence of the Crown is necessary before it can hold real estate.

The Bank.

The Bank of England or Ireland, in its character of accountant of the government funds, is not compellable to take notice of the trusts affecting any sum of stock. More than *four* names will not (by the rule of the bank) be placed together on the books of the bank, as holders of government stock ; this number is therefore the *maximum* number that can act as trustees of stock. When real estate forms the subject of the trust, care must be taken not to appoint an *alien* trustee ; there is no objection, however, to the nomination of an *alien friend* permanently resident here as a trustee of stock or other personal property.

Aliens.

It is on many grounds, which it is unnecessary here to specify, inexpedient to appoint a married woman (*z*), or a person under age, as a trustee ; nor can the selection of an unmarried woman be recommended, as in case of her marrying, the concur-

(*x*) *Burgess v. Wheate*, 1 Eden, 203.

(*y*) *Att.-General v. Liehfield*, 11 Beav. 120.

(*z*) *Lake v. De Lambert*, 4 Ves. 595 : *Re Kaye*, Law Rep. 1 Ch. App. 387 : and see *Drummond v. Traey*, 1 Joh. 608 ; 8 W. R. 207.

rence of her husband may be required to give effect to certain assurances (*a*). The inconvenience of cases where persons under legal incapacity are nominated, is less severely felt now that the Court of Chancery is endowed with an ample jurisdiction as to the substitution of new trustees in place of any who may be unfit to perform the duties incident to the office. Still it is desirable, by nominating proper persons in the first instance, to avoid the expense of an application to the Court under the Trustee Acts.

As property held in trust remains unaffected by the bankruptcy, and (it may be presumed) by the insolvency, of a trustee, there is, of course, no objection on these grounds to the nomination as trustee of any person who may have become bankrupt, or may have been discharged as an insolvent debtor (*b*).

Reason will suggest that in the selection of trustees regard should be had to the onerous and responsible nature of the office, to the discretion frequently required for its proper discharge, especially to the fact that a trustee ought to turn a deaf ear to all proposals for investing trust funds on those dubious securities which promise a high rate of interest, and, lastly, to

Bankrupts
and insol-
vents.

(*a*) *Brook v. Brook*, 1 Beav. 531. There is, however, no rule against the appointment of unmarried women as trustees. *Re Campbell*, 31 Beav. 176.

(*b*) When difficulties have resulted from bad management rather than from unavoidable misfortune, it is not to be supposed that recourse will be had to the individual who has so manifested his unfitness. Still it often happens that the man who can conduct the affairs of others creditably, mismanages his own.

the disinterested efforts required of a trustee for the fulfilment of his trust. The persons selected should therefore possess qualifications of age, character, and standing in society adequate for these purposes ; and not less than *three* persons answering to this description should, if possible, be obtained. Near relatives, or persons having some pecuniary interest, should be avoided in the selection of trustees, if strangers can be induced to undertake the trust, as the exercise of an unbiassed judgment can rarely be expected from them (*c*).

The Court is unwilling to appoint as trustees persons interested ; but as the difficulty of obtaining persons to act as trustees is increasingly great, the Court sometimes finds it necessary to sanction the appointment of trustees of whom it scarcely approves (*d*).

Acceptance
by execution
of trust deed. Trustees of settlements, although named as parties to the deed, very frequently omit to execute. One reason why their execution of the deed should always be procured is, that it affords the best evidence that the *trust has been accepted*. The acceptance of the trust may, however, be shown by acts done by the trustee in the discharge of the duties of his office.

By acting in
the trust. (*c*) Romilly, M.R., refused an application to appoint a near relative, observing that the worst breaches of trust were usually committed by relatives, who found themselves unable to resist the importunities of their *cestuisque trust*. *Wilding v. Bolder*, 21 Beav. 222.

(*d*) *Re M^r Cook*, 2 Ir. Jur. N. S. 74 : *Exp. Clutton*, 17 Jur. 988 : *Re Giraud*, 32 Beav. 385.

Trustees appointed by a will, for example, are considered to have accepted the burden of the trusts on their taking out probate, or otherwise acting as executors of the will (*e*) ; trustees under a deed, when they receive or pay in the capacity of trustee moneys receivable or payable by virtue of the deed (*f*).

Trustees who have, without objecting, been appointed as such for a series of years, although they may not have signed the deed or acted in the trust, will be assumed to have accepted the trust (*g*). But a trustee who expressly declines to act and has not executed cannot be fixed with the trust, merely because he has retained possession of the deed until some other person could be found to act (*h*).

In one respect the execution or non-execution of the deed by the trustee may become of material consequence to the *cestuique trust*. This is in the event of a breach of trust being committed, and loss accruing ; when the question frequently arises—what priority will the demand of the *cestuique trust* obtain in the administration of the legal assets of the trustee ?

The claim in respect of a breach of trust amounts *per se* to a *simple contract debt* only (*i*). Where,

Remedy
against
estate of
trustee.

Claim
founded on
a breach of
trust.

(*e*) *Styles v. Guy*, 1 Mac. & Gor. 431.

(*f*) *Ward v. Butler*, 2 Moll. 533 : *Urch v. Walker*, 3 M. & C. 702.

(*g*) *Wise v. Wise*, 2 Jo. & Lat. 403.

(*h*) *Evans v. John*, 4 Beav. 35.

(*i*) *Lockhart v. Reilly*, 1 De G. & J. 464 : *Vincent v. Godson*, 1 Sm. & Gif. 384.

however, the trustee has executed any deed containing a covenant that the trust property shall be applied in a particular manner, the relation of debtor and creditor is then established between them *under seal*, and any demand arising from misappropriation or misapplication of the fund will, in accordance with the ordinary rules of law, amount to a *specialty debt* against the estate of the trustee (*k*).

Acceptance
of trust will
not *per se*
create a spe-
cialty debt.

It is not sufficient to establish that a trustee has accepted the trust, by merely executing the trust deed, for he may execute the deed without entering into any legal covenant, and "there is no such thing as an equitable covenant as distinguished from a legal covenant" (*l*). Thus where new trustees of a marriage settlement executed the deed by which they were appointed, but that deed contained no specific covenant by them for the performance of the trusts of the settlement (although the settled property was assigned to them on precisely the same trusts); and they afterwards committed a breach of trust by investing on bad security, so that a considerable loss was sustained; the Court held that the loss amounted to a simple contract debt only (*m*).

(*k*) *Jenkins v. Robertson*, 1 Eq. Rep. 123 : see *Richardson v. Jenkins*, 1 Drew. 417. The Court also held in this case that the word "covenant" or "agree" is not necessary in a trust deed to constitute a specialty contract; a "declaration" by the trustee that he would stand possessed on certain trusts, was held to be sufficient. *Leaveson & Hawood Ch. 225*

(*l*) *Adey v. Arnold*, 2 D. M. & G. 432—Lord St. Leonards.

(*m*) *Wynch v. Grant*, 2 Eq. Rep. 1135 ; 3 Drew. 312. The

As any kind of interference in the management of the trust is *prima facie* evidence of the acceptance of its burden by the trustee, the presumption is that a person named as trustee interferes in that capacity and in no other. The *onus probandi* will lie on him to show that he has done so from some other motive, and an ambiguous line of conduct will be discouraged by the Court (*n*). Interference in trust
prima facie evidence of acceptance.

A trustee who, by executing the trust deed or otherwise, has accepted the office, is not at liberty to withdraw from it (*o*). Nothing can absolve him from the performance of its duties except the decree or order of a court of competent jurisdiction, or the unanimous consent of his *cestuisque trust*, who must of course be of full age *sui juris*, and legally capable of consenting. If the instrument creating the trust contain any proviso authorizing the retirement of one trustee and the substitution of another, a third method is open to him of being released from the trust (*p*). Trust accepted cannot be renounced.

A person who is nominated to the office of trustee, but has not accepted the trust, and is desirous of avoiding its troubles and responsibilities, is at liberty to renounce, and this notwithstanding any promise that he may have made, prior to the creation of the lands of a debtor are made liable to his simple contract debts by stat. 3 & 4 Wm. 4, c. 104. Disclaimer of trust.

(*n*) *Stacey v. Elph*, 1 M. & K. 195 : *Conyngham v. Conyngham*, 1 Ves. 522 : *Lowry v. Fulton*, 9 Sim. 115.

(*o*) *Manson v. Baillie*, 2 Macq. H. L. C. 80.

(*p*) See Chapters II. & III. "Appointment of New Trustees."

trust, for its fulfilment (*q*). The refusal to accept a trust, or DISCLAIMER, *may* be made at any time, but it should be made at the earliest opportunity. A person nominated as trustee, but who has never acted, may appear in court and there disclaim the trust without executing any deed (*r*). But if a long interval has been allowed to elapse, there is danger lest the Court should presume acceptance of the trust from that circumstance (*s*). A disclaimer should be in writing. No special form of disclaimer is required by law, and a trust of copyhold, chattel, or personal property may be legally disclaimed by word of mouth; with regard to freehold estate, a disclaimer not evidenced by deed might, perhaps, be held insufficient (*t*). Should be evidenced by deed. But whatever be the subject-matter of the trust, "it "is most prudent that a deed of disclaimer should be "executed by a person named trustee, who refuses to "accept the trust, because such deed is *clear evidence of the disclaimer*, and admits of no ambiguity (*u*). It is now believed that a deed of disclaimer, which also purports to be a conveyance of the trust estate, does not necessarily imply any former acceptance of the trust; still a trustee cannot be advised to execute any instrument in the nature of a conveyance, as the subject is not free from doubt, and there is some

(*q*) *Doyle v. Blake*, 2 Sch. & L. 239, per Lord Redesdale.

(*r*) *Foster v. Dawber*, 1 Dr. & Sm. 172; 8 W. R. 646.

(*s*) *Re Uniacke*, 1 Jo. & L. 1: *Wise v. Wise*, 2 Jo. & L. 412.

(*t*) *Townson v. Tickell*, 3 B. & A. 31. See 2 Moll. 253.

(*u*) Per Sir J. Leach, M.R., in *Stacey v. Elph*, 1 M. & K. 199.

danger lest such a deed, unless worded with extreme caution, might have the effect of *fixing the trustee with, instead of relieving him from, the trust* (*v*).

The form best adapted for the purpose is that of a *deed-poll*, reciting the creation of the trust, and that it has never been accepted by the trustee, and ending with a complete renunciation and disclaimer of the trust property and the trusts (*w*). Form of deed of disclaimer.

After executing a disclaimer, the trustee is in the position of a stranger to the trust, and is capable of acting as solicitor, agent, or otherwise (*x*), and may become the purchaser of the trust property, as any other indifferent person may (*y*). Effect of disclaimer.

The effect of a disclaimer (*z*) by one trustee is to vest all powers and authorities in the continuing trustees, who may sell or make title to a purchaser (or proceed against him for specific performance) as

(*v*) *Urch v. Walker*, 3 M. & C. 702, and cases there referred to.

(*w*) One of the advantages attending a proper disclaimer is, that a trustee who has never acted, and has executed such a deed, will not be made a party to a suit instituted in respect of the trust property. Where a trustee, for the first time, *disclaims by his answer*, and the bill is dismissed against him, his costs will be allowed *only as between party and party*. *Norway v. Norway*, 2 M. & K. 278.

(*x*) *Montgomery v. Johnson*, 11 Ir. Eq. Rep. 480.

(*y*) *Stacey v. Elph*, 1 My. & K. 195.

(*z*) A deed of disclaimer by trustees named as protectors of a settlement under the Fines and Recoveries Act, should be enrolled in Chancery. 3 & 4 Wm. 4, c. 74, s. 32.

though they alone had been originally nominated to the trust (*z*). The effect in legal proceedings will be otherwise, as trustees entering into a joint contract at law cannot sever, and proceedings must be taken on a contract by all the parties with whom it is made (*a*).

A form of Deed of Disclaimer suitable for ordinary cases will be found in the Appendix.

Trust devolves upon surviving trustee, with all powers except "bare authorities."

Such trustees as, having been duly appointed, accept the trust, and the survivors of them, will continue to hold the trust estate as joint tenants in law, and in general all powers annexed to the trust may be exercised by them (*b*). One class of powers cannot, however, be always exercised by the legal owners of the trust estate. There are powers which are considered as confidences of a strictly personal nature, and for their exercise the concurrence of all the persons originally nominated may be required (*c*). In the absence of any expression authorizing their exercise by less than the original number, the power will cease to exist when the original number is diminished. With this exception, which does not embrace ordinary trusts for sale or mortgage, the trust

(*z*) *Adams v. Taunton*, 5 Mad. 435 : *Bayly v. Cumming*, 10 Ir. Eq. Rep. 410.

(*a*) *Wetherell v. Langston*, 1 Exch. Rep. 634.

(*b*) *Hudson v. Hudson*, Ca. t. Talb. 129 : *Eaton v. Smith*, 2 Beav. 236 : see 1 S. & St. 165.

(*c*) *Cole v. Wade*, 16 Ves. 44 : *Byam v. Byam*, 19 Beav. 58 ; 1 Sug. Pow. 150, 7th ed. : *Brassey v. Chalmers*, 16 Beav. 231.

estate, with all its incidents, will, on the death of a trustee, devolve upon the survivors (*d*) ; and ultimately (unless a new appointment be made) upon the legal representatives of the last survivor, according to the nature and quality of the trust estate.

As to the extent of the legal interest taken by the trustee, the following are the chief rules which have prevailed. (1) Wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied. (2) The legal estate limited to the trustee shall not be carried farther than the complete execution of the trust necessarily requires (*e*).

Legal interest taken by the trustee.

The Wills Act (*f*) declares (as to all real estate except a presentation to a Church), that where real estate is devised to a trustee, such devise shall be taken to pass the fee simple or other whole interest in the estate unless a definite term of years or an estate of freehold shall be given expressly or by implication. Also (by the next section), where real estate is devised to a trustee without express limitation of the estate to be taken by him, and the beneficial interest shall not be given to any person for life, or, if so

(*d*) *Warburton v. Sandys*, 14 Sim. 622 : *Lane v. Debenham*, 11 Ha. 188.

(*e*) Lewin on Trusts, 5th ed. 175 ; Tudor, Le. Ca. Conv. 2nd ed. 292, 299, and cases there cited. It would appear from a late case in the Chancery Appeal Court that where the court is of opinion that an estate is vested in trustees, yet if an opposite view has been long acted on, a title from the trustees will not be forced on a purchaser. *Collier v. M'Bean*, L. R. 1 Ch. Ap. 81.

(*f*) 1 Vict. c. 26, ss. 30, 31 : see 2 Jarm. on Wills, 263.

given, the trust continues after the life, the devise shall be taken to vest in the trustee the fee simple or other whole interest, and not an estate determinable when the purposes of the trusts shall be satisfied.

The legal estate of trust property is not now liable to forfeiture or escheat (*g*).

The *trust estate* and the *office of trustee* may, under some circumstances, be separated. A trustee who, having accepted the trust, conveys away the trust estate, divests himself of the latter, though not of the former (*h*). The trust would still attach to the estate, into whatever hands it might pass, with one very important exception. An *innocent purchaser*, for *valuable consideration*, and without notice of the trust, taking a conveyance of the legal estate from the trustee, will hold it, both at law and in equity, against all the world (*i*).

On conveyance of trust estate, the trust will attach,

in all cases except one.

Effect of devise by trustee.

The trust estate may not only be conveyed by a sole trustee during his lifetime, but may be devised

(*g*) 13 & 14 Vict. cap. 60, ss. 14, 46.

(*h*) *Wilkinson v. Parry*, 4 Russ. 272 : *Braybrooke v. Inskip*, 8 Ves. 417.

(*i*) *Millard's Case*, 2 Free. 43 : *Burgess v. Wheate*, 1 Eden, 195 : *Willoughby v. Willoughby*, 1 T. R. 771 : *Jones v. Powles*, 3 My. & K. 581 : *Thorndike v. Hunt*, 3 De G. & J. 563 : *Dodds v. Hills*, 2 Hem. & Mill. 424. The notice may be either actual or constructive. *Bourset v. Savage*, L. R. 2 Eq. 134. And the principles of the general law of NOTICE, as affecting purchasers, apply to this case. A *lis pendens*, registered in a suit affecting the trust estate, although it does not *per se* constitute notice, will render a purchaser bound by *any decree made in the suit*.

by his will. The devisee will take subject to all the rights of the *cestuique trust*, in the same way as though a voluntary conveyance had been executed to him during the testator's lifetime. Notwithstanding some uncertainty formerly existing on the point, it was by Lord Eldon finally settled that a general devise of all a testator's estates will suffice to pass estates held in trust, unless it can be collected from expressions in the will, or purposes or objects of the testator, that he did not mean them to pass (*k*). Any expressions manifesting an intention of excluding trust estates from the devise, and of confining it to the beneficial interest—as, for instance, a devise *charged with payment of debts*—will prevent this operation of the general words used. Where a testator devised “all his real estates, whatsoever and wheresoever,” *but charged with a legacy*, it was held that the charge indicated an intention of not including trust estates, and that trust estates did not pass under the devise (*l*). In another case, a *clause of accruer* among the devisees, in respect of the shares of such as should die under twenty-one, was

Effect of a
general devise
of trustee's
estates.

(*k*) *Braybroke v. Inskip*, 8 Ves. 417; Jarm. Wills, 2nd ed. 593.

(*l*) *Hope v. Liddell*, 21 Beav. 183 : *Life Association of Scotland v. Siddall*, 3 D. F. & J. 58. The decisions on the subject of the *ability of a devisee of trust estates to exercise powers* originally confided to his testator, render that question one of extreme difficulty. The following cases may be referred to as containing the latest expositions of the law on this point; *In re Burtt*, 1 Drew. 319 : *Hall v. May*, 3 Kay & J. 585.

held to manifest an intention of the testator that the beneficial interest alone should pass (*m*). And a similar intention was held to be manifested where the devise was to a *class*, the individuals of which were not ascertained (*n*).

Bankruptcy
of trustee.

Trust property of all descriptions will remain unaffected by the bankruptcy of the trustee, "for nothing vests in the assignees, even at law, but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts (*o*)."
By parity of reasoning, it would seem that the insolvency of the trustee does not affect his legal ownership of the trust property. In the event of the bankruptcy of a trustee, the Court is enabled (by stat. 12 & 13 Vict. c. 106, s. 130), on the petition of any person immediately interested, to order the assignees and other persons to convey, assign, or transfer the trust property to such person or persons as the Court may appoint, upon the former trusts.

The bankruptcy of a trustee does not absolve him from his duty as such. If the trust estate be creditor of his private estate, he must prove the demand, or take care that some other person makes proof of it ; and if he neglect this, he will remain liable for the loss, notwithstanding his certificate (*p*). If proof be

(*m*) *Thirtle v. Vaughan*, 24 L. T. Rep. 5—V.-C. Wood.

(*n*) *Re Finney's Estate*, 3 Giff. 465.

(*o*) *Scott v. Surman*, Willes, 402, per Lord C. J. Willes.

(*p*) *Orrett v. Corser*, 21 Beav. 52—M. R.

properly made, the demand of the trust against the private estate of a bankrupt or insolvent will be duly barred by a certificate or discharge in due course of law (*q*). The bankruptcy of a trustee will very probably lead to his being removed from the trust, if the matter comes before the Court; although it would be too much to say that the Court always regards a bankrupt who has obtained his certificate as "unfit" to be a trustee (*r*). ^o

(*q*) *Exp. Holt*, 1 Deac. 248: *Thompson v. Finch*, 22 Beav. 316: on appeal, 8 D. M. & G. 560.

(*r*) *Re Bridgman*, 1 Dr. & Sm. 164; 8 W. R. 598: see *Harris v. Harris*, 9 W. R. 444.

CHAPTER II.

OF THE APPOINTMENT OF NEW TRUSTEES UNDER
A POWER.

Power of
appointing
new trustees.

Form of.

THE facilities afforded under the Trustee Acts, and more recently the provisions of Lord Cranworth's Act (23 & 24 Vict. c. 145), are such as to render the insertion in a will or settlement of a POWER for the appointment of new trustees, a less important precaution than formerly. It is still, however, usual to find such a power in instruments containing trusts likely to be of long duration. This clause usually provides that in case the trustees, or any of them, or any future trustee, shall happen to die, reside abroad, or be desirous of being discharged from, or decline, or become incapable, or unfit to act in the trust, that then, and whenever the same shall happen, it shall be lawful for the *cestuique trust* [or the tenant for life, or the surviving or continuing trustee, as the case may be], by deed [or writing], to nominate and substitute some person to be trustee in the place of the trustee so dying, &c. It is then declared that the trust estate shall be vested in the new trustees for the same uses, and on the same trusts as before ; and, finally, that every new trustee shall be

competent in all respects, to act as though he had been originally appointed to the trust.

This power may be framed in such a manner, and may vest the power of new appointment in such persons, as the author of the trust may think fit. Whatever its provisions may be, they must be *rigidly adhered to* in the appointment of new trustees under it, as any irregularity may be productive of serious consequences in after years (*a*).

It will be borne in mind that two distinct objects have to be attained on every substitution of a trustee under a power. The new trustee is to be *duly appointed* in conformity with the terms of the power, and the trust estate, or property, is to be *duly vested* in him.

It is of importance to the outgoing trustee, as well as to his successor, that the appointment should be duly made, and the transfer duly effected. The transfer alone will not protect the retiring trustee from the consequences of a breach of trust, should such be committed by a successor who is *not* formally appointed. In a recent case, a retiring trustee, in the expectation that another person *would be* duly appointed to the trust, executed a transfer of the trust fund to him, and a breach of trust occurring, with the knowledge of the latter, the former was held

Words of the power must be followed.

Legal transfer to be made to new trustee.

Retiring trustee must see that his successor is duly appointed.

(*a*) The general principles of the law affecting POWERS will apply to all powers of appointing new trustees. As to the mode of executing the deed of new appointment, &c., it is sufficient to refer to the Treatise on Powers by Lord St. Leonards.

liable, notwithstanding his supposed retirement. He had, indeed, retired from the management of the trust, but not from its liabilities (*b*).

Discretionary powers.

New trustees appointed under a power are, in general, considered to be endowed with all the powers and authorities of their predecessors. The question of how far purely discretionary powers are exercisable by them, is one of considerable difficulty, and can be answered only by reference to the actual words made use of in the instrument creating the trust. If the words, either plainly or by inference, confine their exercise to the trustees originally named, or imply a confidence in the personal qualifications of those persons, the powers cannot be transmitted. In every case the intentions of the testator or settlor, as manifested by his expressions, will be looked at.

Appointment of new trustees.

Cranworth's Act.

Lord Cranworth's Act (23 & 24 Vict. c. 145), greatly facilitates the appointment of new trustees in numerous cases. Section 27 provides, *with regard only to trusts created after August, 1860*, that whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, shall die, or desire to be discharged, or refuse or become incapable to act, it shall be lawful for the person nominated for that purpose by the instrument creating the trust, or if there be no such

(*b*) *Pearce v. Pearce*, M. R. 22 Beav. 248 ; 2 Jur. N.S. 843. It was held in this case that the proposed trustee was also liable as trustee *de son tort* in respect of such trust moneys as came into his hands.

person or he be unable or unwilling to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executor or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or being discharged. And on every such new appointment the trust property shall be, with all convenient speed, assigned and transferred so as to become legally vested in such new trustee. Every new trustee so appointed, and also every new trustee appointed by the Court of Chancery, either before or after the passing of this Act, shall have the same powers and authorities and discretions, and shall in all respects act as though he had been originally appointed to the trust.

Section 28 provides that such power of appointing new trustees may be exercised in cases where a trustee nominated in a will has died in the testator's lifetime.

After the appointment of new trustees, the old trustees are accountable not to them, but to the *cestuisque trust*. Nor is an assignee of the old accountable to the new trustees (c).

A direction, usually inserted in charity trust deeds, to the effect that new trustees shall be appointed when the survivors are reduced to a certain specified

Direction to appoint new trustees, when old ones reduced to a specified number.

(c) *Johnson v. Swire*, 3 Giff. 194; 7 Jur. N. S. 670.

number, does not prevent vacancies from being filled up *before* the trustees are reduced to that number (*d*).

This direction, according to the fair construction of the words, would seem to imply that the new appointment must be made by *not less* than the *minimum* number specified. Still it does not appear that a new appointment, made by a still further reduced number, or even by the survivor of them, is invalid (*e*). It would seem that, in construing these powers, the court, as far as possible, upholds the new appointment; and a remarkable instance of this occurred in a case, where the settlement containing a power of new appointment by the *cestuique trust*, with the consent of the surviving trustees or trustee, a new appointment was made by the former alone, after the death of both trustees. The appointment was held to be a valid one (*f*). Another instance of this disposition to support the validity of an appointment, is found in a case (*g*), in which two trustees were appointed by a settlement containing a power enabling the tenant for life, together with the surviving or continuing or acting trustee for the time being, to nominate a new trustee, and directing that the trust estate should thereupon be vested in the newly-appointed trustee, jointly with the surviving or continuing trustee. One of the original trustees having

(*d*) *Doe d. Dupleix v. Roe*, 1 Anst. 86, per Eyre, C. B.

(*e*) *Att.-Gen. v. Floyer*, 2 Vern. 748 : *Same v. Litchfield*, 5 Ves. 831.

(*f*) *Morris v. Preston*, 7 Ves. 547.

(*g*) *In re Roche*, 2 Dr. & W. 287 ; 1 Con. & Laws. 306.

is not imperative.

Disposition
to uphold the
new appoint-
ment.

died, and the other having become bankrupt, it was urged that there was no surviving or acting trustee, and that the power was, therefore, incapable of being exercised. Lord St. Leonards, however, remarked, "That happened in many cases without the power being affected. The construction is not so strait-laced as that." It would seem from these decisions, that where a person whose consent is required to a new appointment of trustees is not in being, or does not fill the character in which the consent is directed to be obtained from him, the appointment may be valid without such consent; but it is not to be concluded that the consent, if *not* impossible to be obtained, can, in any case, be safely dispensed with.

The question how far the appointment of *more* or *fewer* trustees than the original number will be supported, is not capable of an easy answer. It may perhaps be broadly stated, that unless there be some expression in the power showing that an increase or diminution in the number was contemplated, the same number ought to be continued. It is certain that the Court will not approve of trust property which was originally vested in two trustees, being placed within the power of a single trustee (*h*); and, generally speaking, it may also be assumed that one vacancy cannot with propriety be supplied by more than one new trustee. In the following cases bearing on this

How far
more than
the original
number can
be appointed.

(*h*) *Hulme v. Hulme*, 2 My. & K. 682 : "The Court never commits a trust to the care of a single trustee," Ld. Romilly, M. R., 35 Beav. 19.

point the earlier decisions are referred to and commented upon. The validity of an appointment of *four* trustees in the place of *three* original trustees who were all dead, came in question before Knight Bruce, V. C. (*i*). The settlement authorized the appointment "from time to time as often as there should be occasion, of any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying," &c. And the Court, after reviewing the cases of *D'Almaine v. Anderson* (*j*), and *Sands v. Nugee* (*k*), in both of which, under a power containing different words, the appointment of an increased number of trustees had been sanctioned, held that the power had not been properly exercised. An instance of a power so worded as to admit of the appointment of *three* new trustees in the place of *two* original trustees, occurs in the case of *Meinertzhangen v. Davis* (*l*). That decision was followed in the case of *Hillman v. Westwood* (*m*), where the facts were as follows:—A testator appointed three persons trustees of his will, with power for the surviving or continuing trustee, his executors, administrators, or assigns, with the consent of testator's wife, to appoint one or more person or persons to be a trustee or trustees in the room, &c., and thereupon the trust estates to be vested

(*i*) *Exp. Davis*, 2 Y. & C. C. C. 468 : see *In re Welch*, 3 M. & C. 293.

(*j*) Lewin on Trusts, 5 ed. 468.

(*k*) 8 Simon, 130, Shadwell, V. C.

(*l*) 1 Coll. 335.

(*m*) 3 Eq. R. 142.

in such trustee or trustees solely, or jointly with the continuing trustee or trustees. Testator's wife, who was one of the trustees, died, as did also another of the trustees. On a special case, Wood, V. C., held that the last surviving trustee was authorized to appoint two new trustees to act with him, without specifying in whose place they were appointed (*n*).

It seems to be competent for a trustee, to whom is given the power of appointing new trustees, to retire from the trust, and at the same time to appoint a successor (*o*). In a late case the survivor of *four* trustees, being desirous of quitting the trust, was held to be authorized in appointing four new trustees under the words of the power (*p*). Counsel who impugned this appointment, relied upon the two following authorities on the subject of the right of retiring trustees to appoint successors. The first—*Sharp v. Sharp* (*q*),

Right of re-tiring trustee
to appoint successor.

Difference
between
"surviving or
continuing"
and *retiring*
trustee.

(*n*) Other cases on the appointment of a number of trustees differing from the original number are :—*Miller v. Priddon*, 1 D. M. & G. 335 : *In re Fagg's Trust*, 19 L. J. (Ch.) 175 : *Lonsdale v. Beckett*, 4 De G. & S. 73 : *Bulkeley v. Eglinton*, 1 Jur. N. S. 994: *Emmett v. Clarke*, 3 Giff. 32: *Corrie v. Byrom*, Lewin on Trusts, 5 ed. 468 : *Re Tunstall*, 4 D. & Sm. 421 : *Re Pool Bathurst*, 2 Sm. & Giff. 169 : *Reid v. Reid*, 30 Beav. 388.

(*o*) In a case before the late V. C. Parker, two trustees had been appointed by a will, but only one of them survived the testator, and afterwards this surviving trustee disclaimed the trust; but by the same deed exercised a power given to him by the will, of appointing new trustees, and the appointment was upheld. *Hadley v. Hadley*, 5 De G. & S. 67.

(*p*) *Camoys v. Best*, 19 Beav. 414.

(*q*) 2 B. & Ald. 405.

was the case of two trustees who were unwilling to act, and who conveyed to two other persons in supposed execution of a power enabling "the survivors or survivor of the trustees so acting in the trust, or the executors, &c., of the last surviving trustee, by any writing, &c., to nominate a new trustee." The Court of King's Bench, however, decided that a "surviving trustee" means a "trustee continuing to act," as distinguished from one who declines to act, or wishes to withdraw. Romilly, M. R., in like manner, held that a power conferred upon "*surviving or continuing trustees or trustee*" could not be exercised by trustees who were *retiring*. In this case his lordship said:—"There is no question but that these powers ought to be construed strictly, but strictly only in the sense that the donee can only do that which the power enables him to do, but in every other sense the power should be construed liberally, and according to the intention of the donor. . . . It is to be observed that in all these cases there is a tendency to indulge in speculations of intention and in nice distinctions, when in fact the difficulty arises simply from the manner in which conveyancers fill up a common form, where such speculations and distinctions never entered into the mind of the settlor. I feel great dislike to such speculations, but they cannot be altogether avoided. I am of opinion that this must be treated as an ordinary clause, in which the continuing trustee is to appoint a new trustee in the place of one retiring" (r).

(r) *Stones v. Rowton*, 17 Beav. 308; 1 Eq. R. 427.

Generally speaking, any departure from the terms of the trust should be avoided ; and the new trustees should be strictly appointed in the places of their predecessors, without any attempt to vary the number. Where a trustee has the power of appointing a co-trustee he should be careful to appoint such a person as the Court of Chancery would approve of—not a foreigner, or a person out of the kingdom, or a person in straitened circumstances, or open to any other objection. A trustee who is quitting the trust should be equally careful in exercising such a power, as though he were continuing in the trust; and he should resist any attempt to supply his place by a trustee who will be likely to commit or connive at a breach of trust. A trustee who after declining to commit a breach of trust, offers to resign in favour of another who may be more pliable, does that which may involve him in trouble at a future time (s).

A power generally authorizes a new appointment in the event of a trustee becoming “*incapable of acting*” or “*unfit to act*” in the trust. There is a wide distinction between these conditions of disqualification, which may be illustrated by the case of a trustee who has become bankrupt. He is not consequently “*incapable*” of performing any duty annexed to the trust (t), and may appoint a successor under a power authorizing such appointment; but a bankrupt

Appointment
of suitable
successors in
the office to
be attended
to.

Who is in-
capable of
acting, or
unfit to act.

(s) *Palairat v. Carew*, 32 Beav. 567 : and see *Le Hunt v. Webster*, 8 W.R. 434 ; [reversed on appeal, 9 W.R. 918.]

(t) *In re Watts*, 9 Ha. 106.

- Bankruptcy.** trustee has been held by Lord St. Leonards to be “unfit” within the meaning of the power (*u*). By analogy it may be presumed that a trustee discharged as an insolvent is “unfit,” and may be superseded.
- Absence.** Absence from the country is not *prima facie* a circumstance rendering a trustee “incapable” of acting (*x*); but the case would be regarded otherwise were a trustee to settle permanently in a distant place. Thus, where a trustee settled in New York, it was held that he was “incapable” of discharging the duties incident to a trust of leasehold premises in Middlesex (*y*). But where the trust deed declared that any person should cease to be a trustee on his “departing the United Kingdom from whatever cause or under whatever circumstances,” the Court held that the *temporary* absence of a trustee was not within the prohibition (*z*). Although a trustee in going to settle abroad does not thereby cease to fill that office, yet he does that which entitles the *cestuique trust* to require that the office shall be filled by another person. A trustee who from either of the foregoing causes, or from any other suf-
- Trustee going abroad should retire.**

(*u*) *In re Roche*, 2 Dr. & W. 287. There is, however, no absolute rule that a bankrupt is “unfit” to be a trustee—the nature of the bankruptcy will be considered. *Re Bridgman*, 1 Dr. & Sm. 164.

(*x*) *Withington v. Withington*, 16 Sim. 104.

(*y*) *Mesnard v. Welford*, 1 Sm. & Giff. 426. Unsoundness of mind of course renders a trustee “incapable of acting” and the Court will appoint a new one in his place. *In re Cooper*, 25 Law J. Ch. 685.

(*z*) *Re Moravian Society*, 26 Beav. 101.

ficient cause, becomes incapable of fulfilling the duties of his trust, should lose no time in exercising the power of appointing a successor, if he be invested with that power ; but in so doing he should consult his *cestuique trust* as to the nomination of a suitable person in his place, and even if the appointment be made without consulting the *cestuique trust*, the retiring trustee is bound to give him immediate notice of the change (*a*).

Cestuique trust should be informed of change.

While a suit is pending for administration of, or otherwise in relation to the trust estate, the usual and proper course is to apply to the Court *by petition* for a new appointment of trustees. It does not follow that an appointment made without the sanction of the Court, by a person on whom the power was originally conferred would be necessarily invalid (*b*). Nevertheless, an individual accepting the office under such circumstances will run a great risk of sustaining inconvenience and loss, for not only will the *onus* lie on him of proving to the Court that the appointment has been regularly and properly made, but he will have to bear the costs of so doing, as well as of any extra costs that may be occasioned by his appointment (*c*). No person therefore should consent to become a trustee of any property, while it forms the subject matter of a suit in the Court of Chancery, unless appointed by the Court, or under its express sanction.

Appointment pendente lite.

Cannot be advised.

(*a*) *O'Reilly v. Alderson*, 8 Hare, 101.

(*b*) *Graham v. Graham*, 16 Beav. 551.

(*c*) *Attorney-General v. Clack*, 1 Beav. 467.

Expenses.

The expense of a new appointment of trustees may properly be charged on the *corpus* or capital of the fund, inasmuch as it is for the common benefit of all persons interested (*d*), but if unsuitable persons are appointed by a tenant for life of the fund, under a power of appointment, and it becomes necessary to remove them, the Court will charge the expense so incurred on the tenant for life's interest (*e*).

Duty of
newly-ap-
pointed
trustee.

A trustee when newly appointed is not bound to scrutinize the former history of the trust, and the acts of his predecessors; but he is bound to see that the property is duly assigned to or vested in himself; and that all requirements of the law for keeping it secure are complied with (*f*). Where the property consists, for example, of Government stock, he must ascertain that it is properly transferred into his name, and he may be fixed with liability for any loss incurred through neglect of such transfer being effected. He is as effectually bound by a recital in the trust deed that the transfer has been made, as he would be by the transfer itself (*g*).

(*d*) *Carter v. Sebright*, 26 Beav. 376.

(*e*) *Raikes v. Raikes*, 32 Beav. 403.

(*f*) *Macnamara v. Carey*, 1 Ir. L. R. Eq. 23.

(*g*) *Story v. Gape*, 2 Jur. N. S. 706: *M'Gachen v. Dew*, 15 Beav. 84: and see *Fenwick v. Greenwell*, 10 Beav. 418: *Gore v. Bowser*, 3 Sm. & Giff. 6: *Chaigneau v. Bryen*, 8 Ir. Ch. Rep. 251. It may be presumed that the stock intended to be transferred to the trustees in *Story v. Gape*, actually existed, as no doubt was suggested on this point. The hardship would be very great were a trustee bound by a recital, to replace stock which never was in the possession of the settlors.

Generally speaking, whatever be the acts of a trustee, or however unfit he may prove for the fulfilment of his duties, he continues to hold his office until regularly superseded. It may be presumed, therefore, that if no step be taken to supply the place of a trustee who has settled abroad or otherwise become disqualified, it is open to him at any time to resume the management of the trust (*h*).

Trustee remains such until regularly removed.

(*h*) *Attorney-General v. Pearson*, 3 Mer. 412.

CHAPTER III.

OF CHANGE OF TRUSTEES BY THE COURT OF CHANCERY
—THE TRUSTEE ACTS.

Inherent jurisdiction as to change of trustees.

THE original jurisdiction of the Court of Chancery in all matters arising out of trusts, has enabled that Court at all times to interfere in the removal and change of trustees, without regard to the existence of any power of new appointment. This jurisdiction has been always exercised with readiness when the circumstances of the trust made interposition desirable—as in case of a charitable trust, which from its very nature requires the oversight and control of a Court of Equity (*a*). With regard to trusts of a private nature, the Court has uniformly discouraged suits to effect that which could as well be effected by the parties (*b*). But where, from the instrument creating the trust containing no provision for keeping the trust filled, or from any special circumstances, this object could not readily be attained, it has always been the practice of the Court to grant the required relief, on bill filed by the *cestuique trust*, or by the retiring trustee, or by both.

(*a*) *Attorney-General v. Clack*, 1 Beav. 470.

(*b*) *Finlay v. Howard*, 2 Dr. & War. 490.

The following rules and principles of the Court in appointing new trustees were laid down by L. J. Turner, in a recent case (*c*) :—“ First, the Court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust, or clearly to be collected from it. I think this rule may be safely laid down, because if the author of the trust has in terms declared that a particular person, or a person filling a particular character, should not be a trustee of the instrument, there cannot, as I apprehend, be the least doubt that the Court would not appoint to the office a person whose appointment was so prohibited, and I do not think that upon a question of this description any distinction can be drawn between expressed declarations and demonstrated intention. The analogy of the course which the Court pursues in the appointment of guardians affords, I think, some support to this rule. The Court in those cases attends to the wishes of the parents, however informally they may be expressed.”

“ Another rule is this—that the Court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition either to the wishes of the testator or to the interests of others of the *cestuisque trust*. I think so, for this reason, that it is of the essence of the duty of every trustee to hold an even hand between the parties

Rules of the
Court on ap-
pointing new
trustees.

(*c*) *In re Tempest*, L. Rep. 1 Ch. App. 485; 12 Jur. N. S. 539.

interested under the trust. Every trustee is in duty bound to look to the interests of all, and not of any particular member or class of members of his *cestuisque trust.*"

Third rule.

"A third rule is, that the Court in appointing a trustee will have regard to the question whether his appointment will promote or impede the execution of the trust, for the very purpose of the appointment is, that the trust may be better carried into execution (*d*)."

Costs of suit.

According to the practice of the Court, if no person be proposed as trustee, there will be a reference to chambers to approve of a proper person. However if all the parties are competent, and consent to the appointment of a particular person, the Court would at once act upon the consent without any reference being required. A conveyance (to be executed by all proper parties) is then directed to the new trustee; and in general the costs of suit are ordered to be paid out of the *corpus* of the trust estate.

Modern procedure by petition.

This mode of proceeding involving a conveyance of the trust estate was in general use until the passing of 1 Wm. IV. cap. 60 (Sir E. Sugden's Act), which em-

(*d*) *In re Tempest*, L. Rep. 1 Ch. App. 485. It further appears from this case that the fact of the continuing trustee refusing to act with the proposed new trustee would not be sufficient to induce the Court to refrain from appointing him. Also that where the question of appointing a new trustee has been brought before the Court of Appeal for rehearing, the Court, in considering the fitness of the new trustee, is not precluded from regarding evidence of occurrences subsequent to the original hearing.

bodying some minor enactments on the subject, gave enlarged jurisdiction to the Court. A more summary method of substituting trustees of some descriptions of property was provided by this Act. In progress of time, however, it was found that trust funds invested in *shares transferable by deed* (a species of property almost unknown a quarter of a century since) were not within the Act, and further legislation was therefore required. Under that Act, moreover, the Court possessed no power to make an order vesting property in the newly-appointed trustees, but the useless formality of a conveyance was required, by some person who, without possessing any legal or equitable interest, was specially "appointed to convey." This Act further limited the powers of the Court to certain specified cases, and did not provide for numerous contingencies that must continually arise to require the interposition of the Court with regard to the appointment and removal of trustees.

"THE TRUSTEE ACTS," 1850 and 1852, were introduced to supply the deficiencies in, and extend the relief afforded by the Act of Wm. IV. the more useful provisions of which are now re-enacted. These Acts, 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, are incorporated and form together one Act (e). They were not intended to afford facilities for trying disputed

The Trustee
Acts, 1850
and 1852.

(e) 15 & 16 Vict. c. 55, s. 12. It will be convenient throughout this chapter to designate the Trustee Act, 1850, and the Trustee Act Extension, 1852, as the FIRST and SECOND Acts respectively.

questions of title (*f*). Proceedings are now taken under them in almost all cases where the interposition of the Court of Chancery is required for the substitution of trustees, and the transfer of trust property. It is therefore to be supposed that appointments of new trustees will seldom in future be made by the Court, otherwise than under these Acts.

Proceedings
by trustees
desirous of
retiring.

A suit continues to be the only mode of redress open to a *trustee seeking to be discharged from the trust*, the "Trustee Acts" not applying to this case. When a suit is already pending, the retiring trustee, by petition or on motion, applies to be discharged, and on showing that he is in no way accountable to the trust, his application will in general be granted. In discharging a trustee, the Court will, however, act on its established principles, and where infants or other legally-incapacitated persons are interested, will take care not to prejudice their rights. Where no suit is pending, the retiring trustee must proceed by bill, and the costs of the suit will depend on the nature of the reasons which induced the trustee to apply for his discharge. "It is quite settled that a trustee cannot, from mere caprice, retire from the performance of his trust without paying the costs occasioned by that act; it is also quite clear that any circumstances arising in the administration of the trust, which have altered the nature of his duties, justify him in leaving it, and entitle him to receive his costs; but I think that to justify

Rule as to
costs of
trustees so
retiring.

(*f*) *In re Draper*, 9 W. R. 805.

him in that course, the circumstances must be such as arise out of the administration of the trust, and not those relating to himself individually" (Romilly, M. R. in *Forshaw v. Higginson*) (g). A trustee who can show sufficient grounds for his application to be discharged will not be required to find a person willing to take his place; but if a trustee, from mere caprice, desire to be discharged, the Court will be unwilling to release him unless a suitable substitute be provided (h). "If a trustee finds the trust estate involved in intricate and complicated questions, which were not, and could not have been in contemplation at the time when the trust was undertaken, he has, in consequence of that change of circumstances, a right to come to the Court to be relieved" (Lord Langdale in *Greenwood v. Wakeford*) (i). In the ordinary case, the costs of the retiring trustee will be paid out of the estate generally, but if the "intricate and complicated questions" have arisen from the line of conduct of any one of the *cessuisque trust* in particular, the costs will be charged on his interest exclusively (k).

A trustee cannot be required to divest himself of the trust estate piece by piece by a series of deeds, but may claim to transfer the entire by one deed; and in

(g) 20 Beav. 485.

(h) *Courtenay v. Courtenay*, 3 Jo. & Lat. 533; see *Gardiner v. Downes*, 22 Beav. 397; 2 Jur. N. S. 847: *Ardill v. Savage*, 1 Ir. Eq. Rep. 79.

(i) 1 Beav. 581. See also *Legg v. Mackrell*, 1 Giff. 165; 2 De G. & J. 551.

(k) *Conentry v. Coventry*, 1 Keen, 758.

executing such deed he may, under ordinary circumstances, refuse to convey by any other words or description than that by which the conveyance was made to himself (*l*).

There is ground for supposing that where the trust devolves upon a person *who has never undertaken to fulfil it*, as for instance, upon the personal representative of the original trustee, he will be more likely to succeed in charging the trust estates with his costs, than would the original trustee (*m*).

This distinction, adverted to by Lord Langdale (in *Greenwood v. Wakeford*), would seem to follow from the consideration, that where an obligation has not been voluntarily entered into, a wish to be relieved from its burden cannot be thought capricious or unreasonable; and no method exists of obtaining such relief without the aid of the Court of Chancery. When the trust has been *accepted* by the original trustee in his lifetime, it is not competent for his heir at law, or personal representative, after his death, by disclaimer or otherwise, to evade the estate which in due course of law devolves upon him.

The Trustee Acts, 1850 and 1852.

Trustee Acts.

These Acts confer upon the Court of Chancery a

(*l*) *Goodson v. Ellison*, 3 Russ. 594: see *Smith v. Snow*, 3 Mad. 10.

(*m*) 1 Beav. 582; 4 Beav. 212. See Chapter X.

Trust de-
volving upon
heir or ex-
ecutor of
original
trustee.

power of very great importance—the power of transferring property by the order of the Court, without any conveyance or assignment whatever. The jurisdiction under these Acts may be technically described as being *in rem* as well as *in personam*.

It may be remarked that being *remedial* Acts, they will be construed liberally, although they will not be held to extend to any descriptions of property except those mentioned by them. Three classes of property are within their scope.

(1) Land : defined by the interpretation clause [13 & 14 Vict. c. 60, s. 2] to mean manors, messuages, tenements, and hereditaments,

Property
within the
Trustee Acts.

corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein.

(2) Stock : defined to mean any fund, annuity, or security transferable in books kept by any company or society, established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein (n).

(3) *Chose* in action : not defined by the Act, but signifying a right or cause of action ; anything recoverable by process of law, as a debt or judgment.

Where a trustee has been found a lunatic, or is of ^{Lunatic} Trustees.

(n) Shares in ships are included, 18 & 19 Vict. c. 91, s. 10 ; also shares in joint-stock companies, 5 Dr. & Sm. 278.

unsound mind, *i. e.*, incapable, from infirmity of mind, to manage his own affairs (*o*), the Lord Chancellor is enabled by ss. 3, 4, and 5, by order to vest any lands, or to release lands from any contingent right, or to vest the right to transfer stock, or receive the dividends, &c., or to sue for and recover any *chase* in action. In the case of land, the order is to have the same effect as if a conveyance or assignment had been duly executed. The Lord Chancellor refused under this section to make the order where the trustee had no interest capable of "conveyance or assignment," but merely a power of sale (*p*). By section 10 of the Trustee Extension Act, it is provided that the powers conferred by these sections may be exercised by the L. C. sitting in his jurisdiction in lunacy (*q*). By section 7, the Court of Chancery is enabled to convey the legal estate of lands vested in any infant trustee; and by section 3 of the second Act, a similar power is conferred upon the Court of transferring stock standing in the name of an infant trustee. By section 8, the Court is enabled wholly to release any *contingent* rights of infant trustees (*r*).

(*o*) See Interpretation Clause. The act will be found in the Appendix.

(*p*) *Re Franklin*, 3 Eq. R. 719. The husband of a female trustee has been held to be a trustee within the act. *Re Wood*, 7 Jur. N. S. 323; see *Re Bradshaw*, 2 D. M. & G. 900.

(*q*) The Lords Justices of Appeal in England have similar jurisdiction given to them by the Act constituting their Court. The other Equity Judges have no jurisdiction in lunacy.

(*r*) An order made pursuant to section 7, or section 8, of the

Sections 9 and 10 provide, that where any *sole* trustee out of the jurisdiction, or any person who is trustee *jointly* with another, shall be out of the jurisdiction, or cannot be found, the Court may exercise a like power of vesting the land by order (without any conveyance) as the Court may direct (s).

It is provided by sections 11 and 12, that the Court may deal in like manner with the contingent rights of trustees who cannot be found, or may be out of the jurisdiction—whether such contingent rights are solely possessed, or jointly with other persons; and by section 13, the case is provided for where it is uncertain which of two or more trustees was the survivor.

With regard to cases where it is uncertain as to the trustee last known to have been possessed, &c., whether Uncertainty as to trustee being alive.

act will have the same effect as though the infant had attained twenty-one years of age, and had then duly executed a deed conveying or disposing of the property. A vesting order under section 7, as to the estate of an infant tenant in tail in remainder, with consent of the tenant for life, will operate to bar the entail and remainders over. *Powell v. Matthews*, 1 Jur. N. S. 973.

(s) This section underwent discussion in the cases of *Re LCR 5^{Eg}* *Watts*, 9 Hare, 106, and *Re Plyer*, 15 Jur. 766. In both cases *332* a trustee was out of the jurisdiction, and there was one or more continuing trustees. The V.-C. was unwilling to make the vesting order, but there is now no doubt that the order will be made in such cases *under this section and section 34*. See *Smith v. Smith*, 3 Eq. R. 127; *Re Marquis of Bute*, 1 John. 15. An heir on whom the trust estate devolves through the disclaimer of the trustees is a trustee within section 9 of the Trustee Act. *Wilks v. Groom*, 6 De G. M. & G. 205.

he be living or dead, the like power of vesting the trust estate by order is given by section 14 (*t*).

Trustee
dying with-
out heir.

Section 15 provides for the case of a trustee dying intestate without an heir, or of it being unknown who is his heir or devisee. This section does not apply to leaseholds for terms of years; but they may be vested under section 34 (*u*).

Unborn
trustee.

The Court is empowered by section 16 wholly to release the contingent right of an unborn trustee or trustees.

Vesting order
may be made
on refusal or
neglect to
convey.

Sections 17 and 18 of the first Act are repealed by the second Act; and in lieu thereof it is provided (by section 2) that the Court may make an order vesting the trust estate, as may be directed, on the refusal or neglect of a trustee to convey or assign, or to release a contingent right, after demand duly made (as therein directed) by a person entitled to require such conveyance or assignment, or by his authorized agent (*x*).

(*t*) This contingency was provided for by the former Trustee Act, 1 Wm. 4, c. 60. The Court may, however, do under the present Acts, by a vesting order, all that was before accomplished through the interposition of "a person to convey."

(*u*) *Re Mundel*, 6 Jur. N. S. 880.

(*x*) The repealed sections (17 and 18) required the *tender of a deed* to a refusing trustee for execution, before the Court would make the vesting order. The substituted clause merely requires the refusal or neglect of the trustee for twenty-eight days after demand, to justify the Court in making such order, which, when made, is to have the "same effect as if the trustee had duly executed a conveyance or assignment." It was found that under the original sections no mode could be devised of

Section 20 provides, that in every case where the Lord Chancellor or the Court of Chancery is under the Act empowered to make an order having the effect of a conveyance or assignment, or releasing contingent rights, the Court, &c., may, if it be deemed more convenient, *appoint a person* to convey, assign, or release. This section allows an option of proceeding in the manner formerly in use (under the old Trustee Act), and it seems that an impression at first gained ground, that where parties were of ability to convey, the Court would direct a conveyance, instead of making a vesting order. It is, however, now settled, that unless *special* circumstances render the other course desirable, a vesting order will be made in all cases (*y*).

The Court
may appoint
a person to
convey.

Sections 22, 23, and 24 afford similar relief in the following cases:—Where joint or sole trustees of any stock or *chose* in action are out of the jurisdiction, or cannot be found, or where there is uncertainty as to such trustee being alive, or where a sole trustee or one of several trustees of any stock or *chose* in action neglects or refuses to transfer such stock, or to receive the dividends or income for twenty-eight days, after a request in writing by the person absolutely entitled thereto.

Relief where
trustees of
stock, &c.
cannot be
found, &c.

The case of an infant trustee of stock being held to

Infant
trustee of
stock.

compelling the transfer of the legal estate in copyhold lands. Headlam, T. Acts, 84. *Rowley v. Adams*, 14 Beav. 130.

(*y*) *Re Manning*, Kay, App. 28; 2 Eq. Rep. 221. See *Wilks v. Groom*, 6 De G. M. & G. 205.

be unaffected by this Act, a clause was inserted in the second Act, providing that an order might be made, vesting the right to transfer such stock, or to receive the dividends, &c., where the stock is standing in the name of the infant solely, or otherwise (z).

It has been supposed that the term "sole trustee" (occurring in section 22) has a wider signification given to it by the interpretation clause than its meaning imports. The strict and literal construction of that term was, however, upheld in a recent case, when the Vice-Chancellor remarked : "The term sole trustee, in the Act, has a clear and definite meaning ; it means a person originally a sole trustee, or one who has become a sole trustee by surviving" (a).

Where an application was made to the Court, under the 23rd section, by a person entitled to receive dividends of stock, the petitioner was declared entitled to receive such dividends only as had *accrued prior* to the date of the "request in writing ;" and the Court held that it had no power to make an order as to dividends subsequently accruing (b).

(z) The right to receive future as well as past dividends may be vested, 6 W. R. 453; and more recently an order was made by the Court of Appeal, vesting the right to receive both accrued and future dividends in three out of four trustees, the fourth being abroad. *In re Peyton*, 2 De G. & J. 290: See *In re Seton*, Tripp's Forms, 227. As to the meaning of the words "absolutely entitled" in section 23, see *In re Ellis*, 24 Beav. 426.

(a) *In re Randall*, 1 Drew. 401.

(b) *Re Hartnall*, 5 De G. & S. 111.

" Sole trustee " defined.

Order can be
made only
for dividends
accrued.

An important addition to these sections is made by the Second Act (s. 4) by which it is provided that when any person shall neglect or refuse to transfer any stock, or receive the dividends, &c. or sue for, &c. any *chose* in action for twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, the vesting order may be made as above. The request in writing is no longer, therefore, a condition precedent to the action of the Court.

The 24th section underwent discussion in a case where a surviving, but superseded, trustee of stock neglected to make a transfer to two newly-appointed trustees, after request in writing had been duly preferred. The Court held that the new trustees were "absolutely entitled" to receive the stock within the meaning of the Act, and made an order accordingly. In such a case the petition may be presented by the parties beneficially interested in the stock, although the right to legal possession of the stock rests in the trustees (*c*). Who is "absolutely entitled."

The Court is next empowered to make a vesting order where stock shall be standing in the sole name of a deceased person, whose personal representative shall be out of the jurisdiction, or cannot be found, Stock standing in name of deceased person.

(*c*) *Re Russell's Trusts*, 1 Sim. N. S. 404 : and *Re Baxter's Trusts*, 2 Sm. & G. App. 5. The Court will not order the transfer of stock to persons appointed trustees under a power without some evidence as to their fitness for the office. *Re Maynard*, 16 Jur. 1084.

or shall neglect or refuse to transfer, &c. after request duly made ; and the remedy is further extended by section 5 of the second Act, under which the Court may make the vesting order after neglect as therein mentioned, without any request in writing.

Effect of
vesting order
of stock.

The effect of a vesting order is declared by the next section (26), by which the Bank of England is directed to recognize the title of any person in whose favour such order shall have been made, and the Bank is prohibited from acting on the requisition of any person in whose place any appointment authorized by the Act shall have been made. This clause extends to all other Companies and Associations ; but stringent as it appears, it does not seem to have accomplished its object ; and the Bank of England refusing to allow the transfer of stock by a person whose title to it was derived solely from a vesting order under this Act (*d*), a more stringent clause was introduced into the second Act (s. 6), and a complete indemnity is now furnished by the order of the Court to the Bank and to all other Companies, Associations, and persons, for any act done pursuant to such an order ; nor is any inquiry necessary as to the propriety of such order, or the jurisdiction of either the L. C. (sitting in Lunacy), or the Court of Chancery, to make such order (s. 7). The effect of a vesting order as to *chooses* in action is declared by section 26.

Choses in
action.

Copyholds or
customary
lands.

As to *copyhold or customary lands*, it is provided

(*d*) *Re Smyth*, 15 Jur. 644.

(by s. 28), that when the vesting order shall be made by the Court with the consent of the lord of the manor, the lands shall then, without any surrender or admittance, vest accordingly (*e*) ; and that where any person is (under s. 20) *appointed to convey*, such conveyance shall have the same effect, and the lord of the manor shall, subject to the customs of the manor, and to the usual payments, be equally bound to make admittance, &c. as if the persons in whose place an appointment shall have been made had done all acts, and executed all instruments necessary to complete the assurance.

Where a trustee has been duly admitted as a copy-holder, the consent of the lord of the manor should be obtained before applying for a vesting order under this Act. If this cannot be obtained, a person will be appointed under section 20, to convey. The consent of the lord has been dispensed with under special circumstances, where the original trustees have never accepted the trusts, and the legal estate has not descended (*f*).

Consent of
lord of
manor neces-
sary.

By section 29 it is provided that after decree made by a Court of Equity for sale of lands for payment

Heir, &c. of
lands de-
creed to be

(*e*) The *appearance* of the lord of the manor on the hearing is not required under this section ; a *verified certificate* of his consent is held to be sufficient. *Ayles v. Cox*, 17 Beav. 584. As to the practice of vesting copyholds by order, see *Paterson v. Paterson*, 35 Beav. 506; L. R. 2 Eq. 31; 2 Seton on Decrees, 3 ed. 799.

(*f*) *Re Howard*, 3 Eq. R. 846; *Re Flitcroft*, 1 Jur. N. S. 418.

sold to be
deemed to be
trustee.

of the debts (*g*) of a deceased person, every person taking such lands as heir or devisee, shall be deemed a trustee of such lands within the meaning of the Act.

Section 30 enables the Courts of Equity to declare what parties *to certain classes of suits* concerning lands, are trustees of such lands within the meaning of the Act ; and thereupon the Court may make such order as to the estates of persons interested, or who may become interested, whether born or unborn, as the Court is by former sections enabled to make in relation to actual trustees, in being or otherwise.

The powers conferred by these sections (29 and 30) are much enlarged by section 1 of the Second Act, which declares that after decree or order for sale of any lands for any purpose whatever, all persons entitled to, or interested in the lands, who are bound by the decree, &c. shall be deemed to be trustees within the meaning of the Act, and in every such case the Court may make an order vesting the property in a purchaser, or otherwise as the Court may direct (*h*).

Where decree made for execution of a deed.

In a case where a decree had been made in a suit for specific performance, directing the defendant (a

(*g*) A sale for payment of *costs* is not within this section, *Weston v. Filer*, 5 De G. & Sm. 608; but the second act has removed the difficulty. *Hancox v. Spittle*, 3 Sm. & Gif. 478.

(*h*) There is ground for concluding that under this Act the ancient rights of infants may be entirely extinguished. For, in a partition suit the Court has declared the infant a trustee, without reserving to him the old privilege of a day to show cause. *Bonra v. Wright*, 15 Jur. 981; 4 De G. & S. 265.

peer) to execute a deed to secure a rentcharge, various orders had been made by the Court to this effect, but they were disregarded. A petition was then presented by the plaintiff under these Acts, praying the appointment of a proper person to execute the deed in lieu of the defendant, and the evidence clearly showed the defendant's refusal to execute the deed ; it does not appear from the report of the case, but it may probably be assumed that a refusal for twenty-eight days after request was established. Under these circumstances the order was made by the Lords Justices as prayed (*i*).

Section 31 enables the Court to make declarations and to give directions concerning the manner in which the right to any stock or *chase* in action vested under the Act shall be exercised ; and declares that the persons in whom such rights are vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under the Act are enforced. It has been decided that the Court cannot, under this section, order a fund to be paid into Court (*k*) ; but it can direct trustees to lodge the fund in Court under the Trustee Relief Act (*l*).

The sections which we have considered form in themselves a code of law applicable to cases where a transfer is required of trust property from a trustee, or

Court may
give direc-
tions.

(*i*) *In re Mornington*, 1 Eq. R. 369; 4 De G. M. & G. 537.

(*k*) *Re Parby*, 29 L. T. 72.

(*l*) *In re Thornton*, 9 W. R. 475.

a person in the position of trustee, to his *cestuisque trust*, or such other persons as the Court may appoint; and due provision is made, it is believed, for every case where, from legal disability, absence, or any other cause, such transfer shall be found impracticable without the aid of the Court.

Sections 32 to 37 inclusive, form a separate division of the Act, which should be carefully distinguished from the other portions of it. These sections refer to the appointment of new trustees, and the vesting of the trust property in them.

Whenever it shall be expedient (*m*) to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the aid of the Court, the Court is empowered to make an order appointing a new trustee or trustees, either in substitution for or in addition to any existing trustees

General power of appointing new trustees.

(*m*) It is considered expedient to appoint a trustee of full age in the place of an infant. *Re Porter's Trust*, 2 Jur. N. S. 349; see *Re Shelmerdine*, 33 L. J. Ch. 474. Under section 32 the Court has made an order appointing new trustees where the persons having power to appoint them were resident in India. *Re Humphreys*, 1 Jur. N. S. 921. It seems that the Court will interpose more readily than was at first anticipated, and will not minutely investigate the reasons which lead parties to seek its intervention. The meaning of the word "expedient" in the 32nd section, was considered in *Davis v. Chanter*, 6 W. R. 416. Vesting orders are now made where there is no incapacity on the part of the persons possessed of the legal estate to convey. *Re Manning*, Kay, Append. 28. The title of the persons beneficially interested may be shown by affidavit, without strict evidence. *Re Hoskins*, 4 De G. & J. 436.

or trustee ; and whether there be any existing trustee or not at the time of making such order (*n*).

This is, perhaps, the most important and comprehensive section in the Act ; and while conferring ample and beneficial powers, it imposes upon the Court the necessity of great caution, lest new appointments of trustees be made for objects at variance with the intentions of testators and settlors. Several cases that have been decided upon this section show that the Court of Chancery, notwithstanding the wide discretion given, will adhere to its usual maxims in the exercise of this power. As to the number of trustees which the Court will appoint, see Chapter II. *ante*. It may be briefly stated that the Court will not, under any circumstances, appoint a single trustee, where the creator of the trust nominated more than one ; but in other respects the Court may vary the number (*o*). The Court will not willingly appoint a near relative a trustee, much less one of the *cestuisque trust*—that is, if any other suitable trustee can be procured ; nor will the Court appoint an alien, or a person out of the jurisdiction (*p*).

(*n*) The last sentence is added by section 9 of the Second Act, to remove a doubt that seems to have been entertained as to whether the Court could act where no trustee was in being. [Parker, V.-C., however, considered the point clear, and appointed two new trustees in the place of two who had disclaimed. *In re Tyler*, 5 De G. & S. 56.]

(*o*) *Re Ellison*, 2 Jur. N. S. 62; *Re Porter*, 2 Jur. N. S. 349; *Birch v. Cropper*, 2 De G. & Sm. 255; *Re Tunstall*, 4 De G. & Sm. 421; *Emmett v. Clarke*, 9 W. R. 515.

(*p*) Lewin on Trusts, 5 ed. 769, n.

Court will
not interfere
unnecessa-
rily.

It will further be observed that *the Court will not act where its interference is unnecessary*. Where there is a power of appointing new trustees, and some person who is able to exercise that power, special circumstances of difficulty, &c., must be shown before the Court will do for the parties what they can legally do for themselves (*q*).

Succession Again, where there is a duly appointed trustee, acting and willing to act as such, he will not be removed without some good reason. The words of Sir G. Turner, V.-C., in refusing an application, were—"This statute was not intended to give the Court jurisdiction to remove a trustee where he states that he is desirous of continuing in the trust. The Act empowers the Court, whenever it is expedient, to appoint new trustees; but that provision is, I think, confined to the appointment, and does not extend to the discharge of a trustee who is willing to remain" (*r*).

(*q*) Where one of the trustees of a settlement, containing a power of new appointment, became incapable of acting through unsoundness of mind, the Court made the order. *In re Davis*, 3 Mac. & G. 278. And in cases where necessary parties have been living in distant parts of the globe, orders have been made under this section; see *Re Humphrey's Estate*, 1 Jur. N. S. 921; *Re Harrison's Trust*, 22 L. J. N. S. Ch. 69. The Court will not enter into the question of the validity of a settlement on an application under this section, but will simply appoint a trustee to protect whatever rights exist under the settlement. *Re Matthews*, 26 Beav. 463.

(*r*) *Re Hodson*, 9 Hare, 118; see also *Re Blanchard*, 7 Jur. N. S. 505; *Re Hadley*, 5 De G. & S. 67; *Re Garty*, 3 N. R. 636: but the Court will make a vesting order in a case where there are persons in being who might convey. *Re Manning*, Kay, App. 28.

Another principle, on which the Court will act in exercising this power, is—*That all parties really interested must be before the Court(s).* Thus, where the persons, beneficially interested in *six-sevenths* of a fund, applied for the appointment of a new trustee, the Vice-Chancellor declined to accede to the application in the absence of the party entitled to the remaining one-seventh, no grounds having been alleged for the omission to serve him (*t*). In another case, the application being for the appointment of new trustees in the place of two who were desirous of retiring, the M. R. required both the old trustees, and all the *cestuisque trust* to appear, and directed the petition to stand over for that purpose (*u*).

All persons interested to be before the Court.

Where it can be shown that the service of some of the persons interested is impracticable (as from their being out of the jurisdiction), the Court may make the order without reference to them (*x*). Nor is it necessary to bring before the Court persons who are *remotely* interested, when those more *immediately* interested in the same fund are made petitioners, or are served with notice of the application. Thus, where the interest in a trust fund was made the subject of various settlements, and it was sought to appoint new trustees of the original deed, service on the several

Unless service impracticable;

—or the interest very remote.

(*s*) *Re Fellows*, 2 Jur. N. S. 62; *Re Prescott*, 19 L. T. 371. The beneficial title may be shown by affidavit. *Re Hoskins*, 4 De G. & J. 436.

(*t*) *Re Richard's Trust*, 5 De G. & S. 636.

(*u*) *Re Sloper*, 18 Beav. 596.

(*x*) *Hunter v. Gibson*, 16 Sim. 159.

cestuisque trust, their husbands, and their respective trustees, was considered sufficient, and the presence of grandchildren of the original settlor was dispensed with (*y*).

Section 33 provides that the new trustees to be appointed under the Act shall have all the same rights and powers as if they had been appointed by decree in a suit duly instituted (*z*). It follows from this that trustees, so appointed, sustain that character, in all respects, as though they had been originally named in the creation of the trust; and while taking upon themselves the liabilities and duties incident to the trust, they also become endowed with all its rights and privileges (*a*). The only powers which do not become

(*y*) *In re Smyth*, 2 De G. & S. 781; and see *Re Wyse*, 5 De G. & S. 415.

Propriety of inserting powers for appointing new trustees.

(*z*) Mr. Headlam is of opinion that, in consequence of the satisfactory working of these clauses, it would, in ordinary cases, be prudent to omit from trust deeds the usual power of appointing new trustees. "In the absence of any power in the deed or will, there is no doubt that, when occasion requires, the Court will appoint new trustees, and, under the subsequent clauses, vest the property in the new trustees when appointed. The expense of such a mode of appointment will be considerably less than the expense of a deed appointing new trustees under a power, together with the costs of the necessary conveyances for conveying such property to new trustees without the aid of the Court." (Headl. T. Acts, 3 Edit. 64.) Lord St. Leonards, however, considers that it is not the proper province of Courts of Equity to act where the parties can themselves do so, and considers that the usual powers ought still to be inserted. (R. P. Stat. 407, n.) These clauses can hardly now be considered necessary. See page 28, *ante*.

(*a*) *Cole v. Wade*, 16 Ves. 44; *Drayson v. Pocock*, 4 Sim. 283.

exercisable by trustees substituted by the Court, either under its general jurisdiction or under the Trustee Acts, are such powers as indicate a *personal confidence* reposed in the trustee; powers of this description cannot be exercised by any but the original trustee, unless the terms of the instrument creating the trust admit of their exercise by those upon whom the trust may subsequently devolve (*b*). The question whether the class of powers denominated *discretionary powers* may be exercised by a trustee, appointed by decree or order of the Court of Chancery, was much debated before the recent Act. For example, where the trustees appointed by a marriage settlement were enabled, by the terms of it, to execute a power of sale: the settlement contained no power of appointment of new trustees, and new trustees having been appointed by the Court, it was held that they could not execute the power (*c*). On the other hand, where the instrument creating the trust enabled the *trustees or trustee for the time being*, at their discretion, to make payments for the benefit of one or more children, it was held that trustees appointed by the Court might execute such discretionary powers (*d*).

Can new
trustees ex-
ercise discre-
tionary
powers?

(*b*) *Cole v. Wade*, 16 Ves. 47; *Crewe v. Dicken*, 4 Ves. 97.

(*c*) *Newman v. Warner*, 20 L. J. 654; 1 Sim. N. S. 457.

(*d*) *Bartley v. Bartley*, 3 Drew. 384. In appointing new trustees, the Court of Chancery will not delegate to them the power of appointing successors. *Holder v. Darbin*, 11 Beav. 594—overruling former decisions. This point is not now of much importance, as the Trustee Act affords summary relief in all cases of vacant trusts.

It seems, however, to be now clear that the Court is inclined to hold that all new trustees appointed by it may exercise such powers as are fairly incident to the office (*e*). Few questions of this kind can hereafter arise, as it is provided by Lord Cranworth's Act (*f*), that every trustee appointed by the Court, whether before or after the passing of the Act, shall have the same powers, authorities and discretions, and may in all respects act as if originally nominated a trustee by the instrument creating the trust.

Power to
vest lands,
stock or
chose in
action.

The Court is enabled, upon appointing any new trustee or new trustees, either by the same or a subsequent order (*g*), to direct that the trust estate shall vest in such new trustee or new trustees (s. 34). It is now settled that under this section, where new trustees of a settlement are appointed by the Court, the settled estate may be vested in them, *jointly with a continuing trustee*, although doubts were at one time entertained as to whether this case was within the section (*h*). Section 35 confers a like power of vesting the right to call for a transfer of stock, or the right to recover any chose in action. Section 36 declares that the liability of former or continuing trustees is to remain unaffected by any new appointment under this Act.

(*e*) *Byam v. Byam*, 19 Beav. 66.

(*f*) 23 & 24 Vict. c. 145, s. 27.

(*g*) The trustees may be appointed first in a suit, and afterwards the vesting order may be made. *Re Hughes*, 2 Hem. & M. 695.

(*h*) *Smyth v. Smyth*, 3 Drew. 72 ; 3 Eq. R. 127.

Liability of
old trustees.

The application to the Court, under the foregoing sections, may be made by *any person beneficially interested* in the trust property, whether under disability or not, or by any person duly appointed as trustee of such property (s. 37). The meaning of the words "beneficially interested," in this section, was considered in a recent case (*i*), where copyhold property had been sold in lots after the admission of the infant heir of a deceased copyholder had been duly made. Under these circumstances, it was held that the application for a vesting order was properly made by a purchaser who had lodged his purchase-money in court. It was further ordered that the costs of the order should be borne by the vendors, and should be paid out of the purchase-money of the particular lot, and not out of the general fund.

The power of going before the Master with a statement of facts, in the first instance (*k*), was an important relaxation of equity practice when the Act passed. It is now immaterial, as no new business is sent before the masters, and applications are made before a judge at chambers, under the existing procedure. After the master's certificate was obtained, application might be made to the Court (on motion) for the order (*l*). But since the abolition of the master's offices, the simpler alternative procedure (under ss. 40 and 41) has

Sects. 38, 39.
Petition supported by affidavit.

(*i*) *Ayles v. Cox*, 17 Beav. 584. See *Paterson v. Paterson*, 35 Beav. 506.

(*k*) Section 38. This section and section 39 are now practically obsolete.

(*l*) Section 39.

been adopted. According to the existing practice, a petition may, in the first instance, be presented to the Court, supported by affidavit of the facts (*n*) ; and on the hearing of such motion or petition, the Court may direct such inquiries as it may think fit, or may direct such motion or petition to stand over for further evidence, or in order that notice may be served upon any person or persons, as the Court may direct (*o*). The Court may dismiss any such motion or petition, with or without costs (*p*), and whenever *in a cause or matter pending in Chancery*, the facts necessary for an order under this Act shall appear sufficiently proved, the Court may, either at the hearing of the case, or of any petition or motion therein, make an order under this Act (*q*).

Order may
be made in
suit.

Orders con-
clusive evi-
dence of
statements.

Orders made under this Act, founded on certain statements, are to be conclusive evidence of the matter so alleged ; without prejudice to the power of the Court to direct a reconveyance or reassignment, and to direct payment of costs, where the order shall have been improperly obtained (*r*).

Charity
trusts.

There is nothing in the former part of the Act to exclude *charity trusts* from its operation ; since, how-

(*n*) Section 40.

(*o*) Section 41.

(*p*) Section 42.

(*q*) Section 44.

(*r*) Section 43. An order may be made in a suit without petition. *Wood v. Beetlestone*, 1 Kay & J. 213; *Collard v. Roe*, 4 Jur. N. S. 431; 4 Dc G. & J. 525; and see 9 W. R. 428, 860.

ever, a special clause (*s*) relates exclusively to this class of trusts, it may be assumed that, by whatever means new trustees of charities are appointed, this section will be extensively made use of, for vesting in them the charity estate.

It is by section 46 enacted that no lands, or other property, held upon trust, shall *escheat*, or be forfeited, by reason of the attainder or conviction of the trustee; but this is not to prevent the escheat or forfeiture of property so far as relates to any *beneficial interest* therein of the trustee (*s. 47*). No escheat of trust property.

The Court is enabled, in any suit, to make a decree in the absence of any person who is a mere trustee, and not otherwise interested, on proof that he cannot be found, but no beneficial interest is to be affected by a decree so made (*t*).

The Lord Chancellor may postpone making any order on a petition concerning a person of unsound mind, until the result of a commission *de lunatico inquirendo* shall be known; and in any petition under this Act the order may be postponed until the right of the petitioner shall have been declared in a suit duly instituted for that purpose (*u*). These sections provide for cases in which the summary mode of proceeding, introduced by the previous sections, may seem inapplicable, and the Court frequently refuses to act Summary procedure not suited for all cases.

(*s*) Section 45. As to the appointment of trustees of charities, see Chapter VIII.

(*t*) Section 49. See *Westhead v. Sale*, 6 W. R. 52.

(*u*) Sections 52, 53.

without a more solemn and complete investigation of doubtful cases. Thus, where an application was made to appoint a trustee in the place of a person alleged to be incurably unsound in mind, although it was proved that he had no personal interest, Lord Cranworth, C., refused the application, on the ground that the interests of the lunatic could not be sufficiently protected on an *ex parte* application, and the petitioner was directed to proceed by bill or claim in the usual manner (*x*).

Jurisdiction under the Trustee Acts.

The concluding sections define the jurisdiction of the Court: the powers given by the Act are to extend to all property within Her Majesty's dominions, except Scotland (*y*). Accordingly, where the trustees of certain estates in *Canada* were dead, and the heir at law of the survivor of them was out of the jurisdiction, the Court made an order vesting the legal estate in the lands in the party beneficially entitled (*z*). And in another case the Court made an order vesting lands in Ireland (*a*). It is enacted by sections 55—57, that the powers and authorities given to the Court of Chancery, and to the Lord Chancellor (in lunacy), may be exercised by the Court of Chancery, and the Lord Chancellor of Ireland respectively, with regard to all property in Ireland. A trustee having been appointed in the place of a lunatic trustee, an order was

(*x*) *Re Collinson*, 3 De G. M. & G. 409; 21 L. T. Rep. 81; and see *Re Burt*, 9 Ha. 289.

(*y*) Sections 54, 56.

(*z*) *Re Schofield*, 24 L. T. Rep. 322.

(*a*) *Re Hewitt*, 6 W. R. 537.

made by the L. C. (in lunacy) vesting the estate, but excepting such parts as were in Ireland, as it was held that the vesting order, in such a case, should be made by the Court in Ireland (*b*).

The *Trustee Act Extension* (*c*) was introduced for the purpose of supplying some deficiencies in and enlarging some of the powers of the First Act. As the two are incorporated, and are to be read as one Act, it has been thought advisable to notice several of the clauses in connexion with those actions of the First Act to which they relate.

The Extension Act contains, in addition, a clause enabling the Court to appoint new trustees in the place of persons convicted of felony, and by order to vest the trust estate in such new trustees (*d*). The Lord Chancellor is empowered to make orders of this description in his jurisdiction of lunacy (*e*), and finally, conveyances, &c., having been to some extent superseded by vesting orders under the Act, it is enacted for the protection of the revenue, that every order having the effect of a conveyance or assignment of lands, or a transfer of stock transferable only by deed, shall be

(*b*) *In re Davies*, 3 Mac. & G. 278.

(*c*) 15 & 16 Vict. c. 55—in the former part of this chapter referred to as the “Second Act.”

(*d*) Section 8.

(*e*) Section 10. As to the jurisdiction of the Lords Justices, see *Re Pattinson*, 21 L. J. Ch. N. S. 280; and 15 & 16 Vict. c. 87, s. 15. No such power is given to a provincial Court of Chancery. *Re Ormerod*, 7 W. R. 71.

chargeable with stamp duty, and stamped accordingly (*f*).

Where circumstances render it desirable to take advantage of the important powers conferred on the Court by the Trustee Acts, the following points should be carefully attended to :—

*Application
to be made
as directed by
the Act.*

(1) *Applications to the Court should be made as directed by the Act.* Where the facts of the case are in a small compass, and no difficulty appears, it will be sufficient to apply on motion. Where the facts are numerous, and the case complicated, a petition should be presented. If a bill be filed for the appointment of new trustees, where a petition would have sufficed, the plaintiff will have to bear the costs (*g*). On the same principle, the costs of a *motion* only were allowed to confirm a certificate obtained under section 38 (*h*).

*Grounded on,
the proper
section.*

(2) Care should be taken to *proceed under the section of the Act applicable to the circumstances of the case.* Great inconvenience has arisen from applications under wrong sections. In one instance the Court refused under the 10th section to vest the trust estate in a new trustee, together with a continuing trustee; applications for such an order have since been made under section 34, with success (*i*).

(*f*) Section 13.

(*g*) *Thomas v. Walker*, 18 Beav. 521.

(*h*) 19 L. T. Rep. 9.

(*i*) *In re Watts*, 9 Ha. 106; *Smith v. Smith*, 3 Eq. R. 127; 3 Drew. 72. See Morgan's Chancery Orders, *passim*. An

Some years after the passing of these Acts, jurisdiction in equity was conferred on the County Courts. 28 & 29 Vict. c. 99 enacts (s. 1, par. 5), that in all proceedings under the Trustee Acts or any of them, in which the trust estate or fund to which the proceeding relates does not exceed in amount or value the sum of £500, the County Court shall have all the power and authority of the Court of Chancery. It will be seen hereafter (Chap. VI.) that the County Courts have also had jurisdiction under the Trustee Relief Acts conferred upon them.

Jurisdiction
of the
County
Courts.

order should by its date appear to have been made subsequently to the production of the necessary evidence. *Re Havelock's Trust*, 11 Jur. N. S. 906. The registrars in Chancery will not pass any order made under the Trustee Act, 1850, or the Trustee Extension Act, or the Transfer of Land Act, 25 & 26 Vict. c. 53 (under which Act vesting orders of registered land may also be made), which shall have the effect of a conveyance or assignment of lands or a transfer of stock, until the same be duly stamped as required by law. The officers of stamps will at any time stamp an order after it is written, and before it is passed by the registrar. (Reg. Office, Dec. 19, 1862. The practice is the same in Ireland.)

The Landed Estates Court in Ireland has all the powers of the Court of Chancery as to removing trustees, making vesting orders, &c., 21 & 22 Vict. c. 72, s. 66.

CHAPTER IV.

OF THE INCIDENTS AND LIABILITIES OF THE OFFICE OF
TRUSTEE.

Duties of the office must be jointly performed.

ONE of the main points of difference between the office of executor and that of trustee is, that while the former can legally do many acts affecting the estate, without the concurrence of his co-executors, the trustee has no such power, but must, in conjunction with his co-trustees, fulfil the duties of the office. It frequently happens that one of several trustees acquires a more minute knowledge of the circumstances of the trust, takes a greater interest in it, and is by his co-trustees, as well as by the *cestuique trust*, looked upon as the "acting trustee." This is especially likely to happen where one of the trustees is a man of legal education, or of known aptitude for business. Perhaps there is no more dangerous fallacy than that involved in the common expression "the acting trustee." ALL TRUSTEES WHO HAVE ACCEPTED THE TRUST ARE CONSIDERED AS "ACTING TRUSTEES," and they have no right to delegate their duties to any one of their number. The evasion of duty, however well-meaning in itself, constitutes a breach of trust, which has in many instances been severely visited on the *non-acting* trustees.

Fallacy of "acting trustee."

Conse-
quences of delegation.

Many instances might be cited of the application of this rule. It is sufficient to mention a case where two trustees, appointed by a settlement containing the usual power for varying securities, joined in a power of attorney under which stock was sold out, and the produce placed to the account of one of them : This act was held by the Lords Justices to be a breach of trust ; and the trustee who admittedly received no part of the fund was ordered to bring the whole amount into court (*a*).

“ Trustees who take on themselves the management of property for the benefit of others have no right to shift their duty on other persons ; and if they do so they remain subject to responsibility towards their *cestuisque trust* for whom they have undertaken the duty ” (*b*). But a trustee is of course justified in delegating any duty in conformity with an express direction or permission given by the terms of the trust (*c*).

It is usual to find in trust deeds an *indemnity clause*, Effect of indemnity clause. or proviso that no trustee shall be answerable for the acts, receipts, or defaults of his co-trustee. This in-

(*a*) *Wiglesworth v. Wiglesworth*, 16 Beav. 269. See also *Langford v. Gascoyne*, 11 Ves. 333; *Booth v. Booth*, 1 Beav. 125; *Clough v. Bond*, 3 My. & C. 490; *Hanbury v. Kirkland*, 3 Sim. 265; *Trutch v. Lamprell*, 20 Beav. 116; *Thompson v. Finch*, 22 Beav. 316; *Cowel v. Gatcombe*, 27 Beav. 568; *Eaves v. Hickson*, 30 Beav. 136.

(*b*) Lord Langdale in *Turner v. Corney*, 5 Beav. 517.

(*c*) *Kilbee v. Sneyd*, 2 Moll. 199; *Wilkins v. Hogg*, 3 Giff. 116.

demnity clause cannot, however, be relied on as affording any protection to the trustee against the consequences of a breach of trust; nor will a Court of Equity, in dealing with a breach of trust, regard the presence or absence of such a clause (*d*).

Recent act.

Although the presence or absence of this clause is really an immaterial circumstance, it is provided by Lord St. Leonards' Act (*e*) that every instrument creating a trust shall be deemed to contain a clause (similar to the usual trustees' indemnity clause), rendering a trustee liable only for such money and other property as shall come into his hands, notwithstanding his having signed any receipt for the sake of conformity; and rendering one trustee accountable for his own acts only, and not for the acts of another trustee or of any banker, &c. with whom trust moneys may be deposited, nor for any other loss unless incurred through his wilful default.

The protection afforded by an indemnity clause to executors is very slight, as the setting apart of a sum to meet a particular legacy or bequest constitutes them *trustees of that fund*, and as such, subject to all the rules affecting trusteeship. In a late case, executors having assented to a specific bequest, were held to be

(*d*) *Williams v. Nixon*, 2 Beav. 472; *Hanbury v. Kirkland*, 3 Sim. 265; *Pride v. Fooks*, 2 Beav. 430; *Brumridge v. Brumridge*, 27 Beav. 5; *Rehden v. Wesley*, 29 Beav. 213.

(*e*) 22 & 23 Vict. c. 35, s. 31. The receipt of trust money by a person authorized by the trustees to receive it as agent, binds the trustees, and discharges the person making the payment from liability. *Robertson v. Armstrong*, 28 Beav. 123.

trustees as completely as though the fund had been duly assigned to them on express trusts; and one of them having allowed his co-trustee to receive the money, claimed the benefit of an indemnity clause in the will, which provided that no liability should be incurred by reason of the acts, &c. of a co-executor; —this was overruled, and he was declared liable for the breach of trust (*f*). Where the act of one trustee does *not* amount to a breach of trust, his co-trustees will not be visited with the consequences of it, even though there be no indemnity clause in the instrument creating the trust (*g*).

As one trustee is not (except under very special circumstances) justified in allowing his co-trustee to retain the trust fund in his hands, or even to receive payment of the proceeds of a sale of trust property (*h*), and as a sum of money cannot possibly be in the possession of two or more persons at the same time, it follows that the only course that can be adopted without risk, is the payment of such trust funds as cannot be either invested, or applied for the purposes of the trust, into a bank to the joint account of the trustees. It will appear hereafter (*i*) that a trustee is not, without some special reason, allowed to retain moneys in his hands uninvested, and where a trustee is not jus-

Where there
has been no
breach of
trust, trustee
accountable
for his own
acts only.

Trust moneys
should stand
to joint
account.

(*f*) *Dix v. Burford*, 19 Beav. 409.

(*g*) *Leigh v. Barry*, 3 Atk. 584.

(*h*) *Lincoln v. Wright*, 4 Beav. 427; *Trutch v. Lamprrell*, 20 Beav. 116.

(*i*) Page 95.

Liability avoided if neither payment nor investment could be made.

tified in doing so, it follows that he is equally in default in committing the trust fund into the hands of a banker. Circumstances, however, will sometimes render it necessary that a sum be kept available for current expences, or for contingent payments, and it is then alone that trustees will be justified in making use of the convenience afforded by a bank, nor will they, in such cases, be held liable for any loss that may accrue by the failure of the bank. Two cases may serve to show how far special circumstances will exonerate the executor or trustee in case of loss by such failure. In *Moyle v. Moyle* (*k*) moneys had been left for some years in a banker's hands, and loss arising therefrom, Lord Lyndhurst, C., considered that the fact of there being contingent payments to meet (urged as an excuse by the trustee) constituted the greater reason for making the fund productive by investment, and held that a breach of trust had been incurred. In *Johnston v. Newton* (*l*), funds deposited with a banker had been lost by his failure, some weeks before the expiration of the twelve months allowed by law to an executor for distribution of the fund : Wood, V.-C., held that, under these circumstances, the executor was not accountable for the loss, and significantly remarked that "it was difficult enough to induce persons to act [as trustees], but if the law were to be as contended for by the plaintiff, it would be quite impossible to induce any one to accept so onerous an office."

(*k*) 2 Russell & M. 710, reversing the decision of the M. R.

(*l*) 11 Ha. 160; 1 Eq. Rep. 512.

Although one of several trustees cannot, with a due regard to the security of his colleagues, be allowed to receive funds arising from the sale of trust property or other principal funds, it would seem to be allowable for *rents, dividends, or other annual proceeds* arising from the trust property to pass through the hands of one, without involving the others in liability in the event of loss (*m*). Again, in charitable trusts, the act of the majority will be deemed sufficient, and the minority will not be held liable. These are exceptional cases in which obvious convenience and necessity are held to warrant a deviation from the general rule (*n*).

The result of the modern cases on this subject may perhaps be expressed as follows :—Wherever a prudent and cautious man would, in the ordinary course of business, leave money for a temporary purpose in the hands of another person, it will, under similar circumstances, be allowable for a trustee to commit trust moneys to the charge of a banker, or agent, or to his co-trustee in the character of agent, and he will not be accountable for any loss that may ensue. The degree of caution that would be exercised by a prudent man with regard to his own affairs is expected of a trustee in dealing with the affairs of his *cestuique*

*Dividends
may pass
through the
hands of one.*

*How far
necessity may
justify a
trustee.*

(*m*) *Williams v. Nixon*, 2 Beav. 472. One trustee may be employed by his colleagues to hold the deeds and receive the rents. *Cottam v. E. C. Railway Company*, 1 Joh. & Hem. 243.

(*n*) “Necessity, which includes the regular course of business, will exonerate,” per Lord Cottenham, L. C., in *Clough v. Bond*, 3 M. & C. 497, *et vide Edmonds v. Peake*, 7 Beav. 239.

trust (o). On this principle a trustee may, for a *temporary* purpose, lay out the funds in Exchequer Bills, or having funds to transmit to a distance, he will be justified in doing so through the medium of a bank of established reputation, or in taking the bills of persons in good credit, made payable at the place where the money is to be forwarded, and he will not be held accountable for any loss that may follow (*p*). Still less will he be chargeable with loss occasioned by a robbery, against which no amount of foresight could have guarded (*q*). But if the money ought to have been withdrawn, and placed in some secure investment, the trustee will be liable (*r*). The trustee must be careful as to the solicitor or agent whom he employs in relation to trust property ; for if there be a fraudulent misappropriation he may have to make good the loss (*s*).

When it becomes necessary to lodge trust money in bank, the trustee should be careful to lodge to the *separate credit of the trust (t)* ; for trust money should, under all circumstances, be *ear-marked*, so as

(*o*) *Jones v. Lewis*, 2 Ves. 241; *Exp. Belchier*, Amb. 219 ; *Massey v. Banner*, 1 Ja. & W. 241.

(*p*) *Exp. Belehier*; *Routh v. Howell*, 3 Ves. 564; *Matthews v. Brise*, 6 Beav. 239.

(*q*) *Morley v. Morley*, 2 Ch. Ca. 2; *Exp. Griffin*, 2 Gl. & J. 114.

(*r*) *Lunham v. Blundell*, 4 Jur. N. S. 3; *Wilkinson v. Berwick*, 4 Jur. N. S. 1010. As to the safe custody of securities and valuables, see *Mendes v. Guedalla*, 2 Joh. & Hem. 259.

(*s*) *Bostock v. Floyer*, L. R. 1 Eq. 28.

(*t*) *Wren v. Kirton*, 11 Ves. 377; *Massey v. Banner*, 1 Ja. & W. 241.

Trustee not
liable for a
casualty.

Moneys
should be
lodged to
credit of the
trust.

to distinguish it from the money of the trustee (*u*). The lodgment to a separate credit will not only obviate the inconveniences arising from a confusion of trust and private funds, but will protect the trust estate from loss in the event of the bankruptcy or insolvency of the trustee. As the position of the trustee in regard to the trust is not affected by his becoming bankrupt or insolvent, he must not omit to protect the interests of his *cestuisque trust* against his own creditors. In case of his allowing the creditors to benefit at the expense of the trust property, or of his neglecting to prove the demand of his *cestuisque trust*, he will incur the liabilities of a breach of trust, against which the customary certificate granted by the Court of Bankruptcy will do nothing to protect him (*x*). On the same principle, where a trustee finds it requisite to transmit trust moneys to a distance by means of bills, they should be taken by him in the character of trustee, so that in case of their being dishonoured, the nature of the transaction may clearly appear, and

To avoid loss
by bank-
ruptcy, &c.

Duty of
trustee in
that event.

(*u*) *Gray v. Haig*, 20 Beav. 219; *D. of Leeds v. Amherst*, 20 Beav. 239. The trustee who allows trust money or stock to remain in his own name, increases the chances of future litigation; and in case of doubt whether it belong to himself or to the trust estate, the Court may be disposed to presume against him, and in favour of the *cestuique trust*. *Re Thornton*, 9 W. R. 475; *Mason v. Morley*, 34 Beav. 471, 475.

(*x*) *Wren v. Kirton*, 11 Ves. 377 (per Lord Eldon); *Orrett v. Corser*, 21 Beav. 52; *vide Thompson v. Finch*, 25 L.J. (Ch.) 681.

the loss be sustained by the trust estate (*y*). A trustee is not justified in lodging money in such a way as to put it out of his own control (*z*).

Trust funds
mixed with
private
funds.

One of the inconveniences arising from the too frequent practice of keeping trust moneys to the general account of the trustee, is the difficulty (almost amounting to an impossibility, in the event of his death) of appropriating payments to the fund from which they were intended to be made. This subject was considered by the Court of Appeal in Chancery, in a case where various sums received by an official assignee of the Court of Bankruptcy in that capacity had been lodged to his credit at his private banker's, and left undistinguished from his own funds. It was determined to place sums paid out on his cheques against the *private* estate of the deceased assignee, as far as it would extend, before placing them against the *trust* estates, and the ultimate balance was treated as belonging to the latter as clearly as though specifically lodged to that credit. The circumstances were special, but the case is important as determining the principle on which such accounts will be adjusted (*a*).

Duties of the
trust cannot
be apportioned.

Where there are co-trustees, the lodgment of money should, like all other acts incident to the trust, be the joint act of all of them. Money should

(*y*) *Wren v. Kirton*, *ubi supra*; *vide Fletcher v. Walker*, 3 Mad. 73.

(*z*) *Salway v. Salway*, 4 Russ. 60; 2 R. & M. 215.

(*a*) *Pennell v. Deffell*, 4 D. M. & G. 372, see p. 382 *et seq.*

be lodged to their joint account, and made payable upon their joint order (*b*). The duties of the office cannot in general be apportioned among themselves, however convenient such a division of labour might prove. For the management of every portion of the trust property, the united discretion of all the trustees is required. It does not appear that the act of a majority has ever been sanctioned by the Court of Chancery, or taken as equivalent to the act of the whole, except in trusts of a charitable nature, where for most purposes the act of the majority will be held to be the act of all, for reasons that are wholly inapplicable to the case of a private trust (*c*). The terms of the instrument creating the trust may in this particular, as in others, warrant a departure from the general rule, and consequently when an *express direction* to that effect has been given, the duties of the office may be delegated to such person as the author of the trust may appoint (*d*).

Trustees being thus bound to act together, and give their joint services to the execution of the trust, it follows that they should unite in appointing a legal adviser to act for them, either in a suit or otherwise. If trustees appoint separate solicitors, and are repre-

Without
special direc-
tion in the
trust deed.

(*b*) *Clough v. Bond*, 3 My. & C. 490; *vide White v. Baugh*, 3 Cl. & F. 44.

(*c*) *Wilkinson v. Malin*, 2 Tyr. 572; *Perry v. Shipway*, 1 Giff. 1; 5 Jur. N. S. 1015. See Chapter VIII. "Of Charitable and Religious Trusts."

(*d*) *Kilbee v. Sneyd*, 2 Moll. 199; *Davis v. Spurling*, 1 Russ. & M. 64.

sented by separate counsel, the increased expense will fall on themselves, and not on the trust fund, as only one set of costs is usually allowed by the Court (*e*). If a trustee finds that his co-trustee will not join with him where their united action is important, his best course may be to apply for the advice and opinion of an equity judge under statute 22 & 23 Vict. c. 35, s. 30 (*f*).

Discretionary powers cannot be delegated.

A trust of such a nature as indicates a *personal confidence* reposed in the judgment and discretion of the individual trustee cannot under any circumstances be delegated ; and where committed to several persons, it must be exercised by them jointly, and cannot be apportioned between them, or exercised by less than the whole number (*g*). It has been seen that a transfer of the trust estate has not the effect of investing the transferee with these powers, unless words are used which admit of their exercise by persons on whom the trust estate may legally devolve, or who may be the successors in office of the original trustees (*h*). But if a power of sale be vested in the "trustees for the time being," it cannot be exercised by a single trustee (*i*) ; and it seems highly probable, though not

(*e*) See Chapter X. "Costs and Expenses of Trustees."

(*f*) See Chapter IX. "Judicial Advice."

(*g*) *Cole v. Wade*; *Crewe v. Dicken*; *Brassey v. Chalmers*, cited p. 20, 63, above ; *Att.-Gen. v. Gleg*, 1 Atk. 356; *Bradford v. Belfield*, 2 Sim. 264.

(*h*) See p. 20, 63, above.

(*i*) *Lancashire v. Lancashire*, 2 Ph. 576; 1 De G. & Sm. 288.

certain, that a trust for sale, to be exercised with the consent of certain specified persons, cannot be exercised with the consent of the survivors after the death of one of them (*k*). The Court of Chancery will not only refuse to exercise a discretionary power either in the lifetime or after the death of the trustee, but will refuse to control or interfere with its exercise by the trustee, at least so long as his conduct appears to be uninfluenced by corrupt or improper motives (*l*). Where trustees either decline to exercise a discretion, or exercise it wantonly and unreasonably, or with a view to their personal interest, the Court may question and control their discretion (*m*). A trustee cannot, therefore, be compelled to exercise a purely discretionary power : and if he exercises it, he cannot be compelled to state the grounds on which he has exercised it, although if he do state his reasons, the Court may consider the validity of them (*n*). But if a trustee is by the terms of the trust bound to do a certain act on the requisition of a certain person, he is compellable to do it, if that person so require, and this even though

(*k*) *Sykes v. Sheard*, 2 De G. J. & Sm. 6.

(*l*) 2 Sugden, Powers, 174 (7 edit.); *Maddison v. Andrew*, 1 Ves. 57; *Pink v. De Thuisey*, 2 Mad. 157; *Kekewich v. Marke*, 3 Mac. & G. 326; *Re Coe's Trust*, 4 K. & J. 199. The rule as to the non-execution of discretionary powers by the Court was considered by the House of Lords in the case of *Prendergast v. Prendergast*, 3 H. Lords Ca. 195.

(*m*) *Mortimer v. Watts*, 14 Beav. 622; *Eland v. Baker*, 9 W. R. 444.

(*n*) *Lee v. Young*, 2 N. C. C. 532; *Re Wilkes's Charity*, 3 Mac. & Gor. 440.

it place the trustee under a liability which he wishes to escape : this he must consider before accepting the trust (*o*). Where a suit has been instituted to administer the trust, the exercise of a power of appointment, or other discretionary power, is taken out of the hands of the trustee to this extent, that his acts must be approved of and confirmed by the Court before they can be regarded as valid (*p*).

Otherwise where there is an "interest coupled with a power."

A trust not purely discretionary, but consisting of a *power* of acting, combined with a legal *interest* in the trust estate, differs widely from that just considered, and possesses the important quality of survivorship. Where, for instance, an estate is vested in two trustees *for sale*, it may be sold by the survivor of them (*q*). The fact of this discretion being given to them will not alter the quality of the trust so as to render it a purely discretionary trust of the kind above referred to (*r*).

Where several persons have been appointed trustees, and one of them renounces or disclaims the trust, a power may be executed by the others (*s*). Many of

(*o*) *Beauclerk v. Ashburnham*, 8 Beav. 322; *Cadogan v. Essex*, 2 Drew. 227.

(*p*) *Middleton v. Reay*, 7 Ha. 106; *Gray v. Gray*, 13 Ir. Ch. Rep. 404; *Att.-Gen. v. Clack*, 1 Beav. 467.

(*q*) *Cole v. Wade*, 16 Ves. 46.

(*r*) *Lane v. Debenham*, 11 Ha. 188; 22 L. T. Rep. 143. A trust for sale was considered by Mr. Fearne as merely *ministerial*, but such is not the opinion now generally entertained.

(*s*) *Hawkins v. Kemp*, 3 East, 410; *Cooke v. Crawford*, 13 Sim. 96.

these difficult questions may be avoided in future by the trustee who is in doubt as to the extent of his powers, availing himself of the enactment which enables him to obtain summarily the opinion and direction of an equity judge (*t*).

It was long since decided that a trustee was liable for moneys received by his co-trustees if he joined in the receipts, although no part of the money came into his hands (*u*). The injustice of this rule was severely felt, and afterwards came to be acknowledged, for trustees (unlike executors) must *all* join in the receipt, or there will be no valid discharge. This rule, by the judgment of Lord Eldon in the leading case of *Brice v. Stokes*, was so far relaxed as to relieve from liability the trustee who could prove that he joined in the receipt merely to give it effect. In the words of Lord Eldon—"At law, where trustees join in a receipt, *prima facie* all are to be considered as having received the money. But it is competent to a trustee, and if he means to exonerate himself from that inference, it is necessary for him to show that the money acknowledged to have been received by all was, in fact, received by one, and the other *joined only for conformity*" (*x*). The presumption, therefore, in such

Liability of a trustee who joins in receipts *pro forma*.

Rule as stated by Lord Eldon.

(*t*) 22 & 23 Vict. c. 35, s. 30; see Chapter IX.

(*u*) *Townley v. Sherborne*, Bridg. 35; 2 L. Ca. Eq. 2 ed. 718.

(*x*) *Brice v. Stokes*, 11 Ves. 324; see *In re Fryer*, 3 Kay & J. 317. All the cases are collected in the notes to *Townley v. Sherborne*, and *Brice v. Stokes*, in 2 Le. Ca. Eq.

cases is that the money was received by all who joined in the receipt (*y*), and the *onus* lies upon him who joined for the sake of conformity, to show that such was the fact, and that consequently he ought not to be held accountable. A trustee so joining in a receipt must therefore prove that no part of the fund has come into his hands, and this defence is of course available only where *the payment of the money is itself a necessary and justifiable action*. Where trustees improperly allow trust money to pass into the hands of one of their number, they cannot evade responsibility by showing that the receipt was signed by them merely for conformity (*z*).

Fund must
not be
allowed to
remain in the
hands of one
trustee.

Although money may have been properly paid into the hands of one of several trustees, it does not follow that the others are justified in leaving it there longer than the exigency of the case may require; by so leaving it they may deprive themselves of the equitable defence described above. The words of Lord Eldon on this subject were as follows (*a*):—“ Though a trustee is safe if he does no more than authorize the receipt and retainer of the money, as far as the act is within the due execution of the power, yet, if it be proved that a trustee under a duty to say his co-trustee

(*y*) *Brice v. Stokes*; *Westley v. Clarke*, 1 Ed. 359; *Fellows v. Mitchell*, 1 P. W. 83.

(*z*) *Hanbury v. Kirkland*, 3 Sim. 265; see *Walker v. Symonds*, 3 Swan. 1.

(*a*) In the leading case of *Brice v. Stokes*, 11 Ves. 319; see *Booth v. Booth*, 1 Beav. 125.

shall not retain the money beyond the time during which the transaction requires retainer, and says, with his knowledge, and therefore with his consent, the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that for ten years together, the question turns upon this: not whether the receipt of the money was right, but whether the use of it subsequent to that receipt was right, after the knowledge of the trustee that it had got into a course of abuse. . . . As soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, *a duty is imposed upon him to bring it back* into the joint custody of those who ought to take better care of it" (b).

(b) There is an important difference in the liabilities of *co-trustees* and of *co-executors* in respect of receipts for moneys paid to one of the number. As every executor can legally perform most of the duties of the office, a valid receipt may be given by one, and there is no occasion to obtain the signatures of others *pro forma*. The rule now established is, that "if the receipt be given under circumstances purporting that the money, although not actually received by both executors, was under the control of both, such a receipt shall charge, and the true question seems to be whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor, for it could have no other meaning. He became responsible for the application of the money just as if he had received it." Per Lord Redesdale in *Joy v. Campbell*, 1 Scho. & L. 341. On the same principle an executor renders himself liable if he join in drawing or endorsing a bill, or in any act

Liability of
an executor
who joins in
receipts.

Duty of trustee to correct conduct of co-trustee.

Probable results of neglect.

More is required of a trustee than the mere performance of his duties with regard to such parts of the trust property as may come under his control. It is his duty to see that any investment stated to have been made by his co-trustee has actually been made, without relying on a mere unsupported statement; and also to ascertain that securities are actually in the repository where his co-trustee represents them as being (*c*). A trustee is further required to interfere actively for the prevention of any breach of trust that may be contemplated by a co-trustee; and if a misapplication of the trust funds have already taken place, he should take immediate steps to have the fund replaced, and, if necessary, institute such proceedings against his co-trustee as may be advised (*d*). Neglect in any of these particulars may have the effect of charging him with any loss consequent on a misapplication of the fund. Decrees are continually made against trustees who have never, by direct personal misconduct, injured their *cestuisque trust*, but have allowed their co-trustees to do so, without exercising timely interference on behalf of the trust (*e*). These decrees commonly declare all the trustees (non-acting

which has the effect of bringing assets into the custody of his co-executor. *Doyle v. Blake*, 2 Scho. & L. 239; *Horey v. Blakeman*, 4 Ves. 608; 2 Le. Ca. Equity, 656.

(*c*) *Thompson v. Finch*, 22 Beav. 316; *Mendes v. Guedalla*, 2 Joh. & H. 259.

(*d*) *Stiles v. Guy*, 1 Mac. & G. 422, Lord Cottenham, C.

(*e*) See *Stiles v. Guy*, 1 Mac. & G. 422, where the earlier cases are reviewed by Lord Cottenham, C.

as well as "acting") liable, *jointly and severally*, to make good the whole amount of the loss, and are usually made with costs against them (*f*).

As soon as a decree for payment is made against two or more co-trustees, *each* of them becomes liable for the *entire sum* found due to the *cestuisque trust*. It frequently happens that the individual by whose active misconduct the loss has occurred proves insolvent; the loss will in that case have to be borne by his co-trustees. It is, however, open to the latter to proceed against the actual wrong-doer, for where the default is made by one alone, he is undoubtedly liable, *as between himself and his co-trustees*, to sustain the loss singly. Where, on the other hand, the default has been committed by all the trustees, jointly, and satisfaction has been made by one of the number alone, he can require the others to contribute their shares, and if they refuse so to do, his proper course will be to institute a suit against them for the purpose of enforcing contribution (*g*).

A suit may be commenced in respect of a breach of

Suits against
trustees.

(*f*) In some instances the estate of a deceased trustee who has been foolish enough to leave the management of the trust in the hands of another, has to make good the loss. In a late case the estates of trustees, who had been dead *nineteen and sixteen years respectively*, were held liable to make good a loss arising from neglect to have stock properly transferred. The bill was filed by the *cestuique trust*, who came of age in 1839, and took no step to assert his rights until lately.—*Story v. Gape*, 2 Jur. N. S. 706.

(*g*) *Lincoln v. Wright*, 4 Beav. 427; *Exp. Shakeshaft*, 3 Bro. P. C. 198; *Knatchbull v. Fearnhead*, 3 Myl. & C. 124.

Decree
against trus-
tees jointly
and severally.

trust by the *cestuisque trust*, either against all the trustees, or against some of them—the representatives of a deceased trustee are usually made parties, but the omission to join them as parties will not debar the *cestuisque trust* of their remedy against such of the trustees as are made defendants. One or more trustees are sometimes joined as plaintiffs in a suit against other trustees ; but the *cestuisque trust* are not necessarily parties to a suit of this character, instituted by a trustee against a co-trustee (*h*). There is no such rule as that a wrong-doer cannot file a bill ; therefore if two trustees have committed a breach of trust, and are equally liable in respect of it, one of them may sustain a bill against the other (who received the produce), to recover the amount for the benefit of the *cestuisque trust* (*i*).

A suit may be instituted for the purpose of attaching the assets of a deceased trustee to answer the loss occasioned by a breach of trust, even though the loss occurred subsequently to the death of the trustee (*k*).

Trustees who have been implicated in a breach of trust, and have been charged with the amount of the loss, have, in addition to their right to contribution from co-trustees, a right to be indemnified *to the extent of the interest* of any *cestuique trust*, by whose solicitation, or with whose consent, the breach of trust

(*h*) *Perry v. Knott*, 5 Beav. 293; *Kellaway v. Johnson*, ib. 319; *May v. Selby*, 1 N. C. C. 235; *Strong v. Strong*, 18 Beav. 408.

(*i*) *Baynard v. Woolley*, 20 Beav. 583.

(*k*) *Devaynes v. Robinson*, 24 Beav. 86.

One wrong-doer may proceed against another.

Remedy in certain cases against interest of *cestuique trust*.

has been committed. Improper investments are usually made in consequence of the persuasion of the person having a life interest in the fund who is anxious to obtain a larger income than the government funds would afford. But the Court will not encourage a suit by a trustee against *cestuisque trust* to compel the latter who have acquiesced in improper investments to indemnify the trustee against the consequences, for if a trustee under these circumstances had a *right* to indemnity the temptations to commit breaches would be much increased (*l*). He may, under some circumstances however, compel repayment of the excess of income paid to tenants for life of the fund (*m*). In a late case, the plaintiff, who had received interest at the rate of 5 per cent. on an investment which she knew to be an improper one, and represented to the Court as being so, was ordered to refund the excess of interest received by her in former years beyond 4 per cent. (*n*). For the purpose of avoiding a multiplicity of suits, trustees have in some instances been allowed, by means of an inquiry in the suit instituted against them for breach of trust, to recover against the life interest of some of

Repayment
of income
paid in ex-
cess.

(*l*) *Browne v. Maunsell*, 1 Ir. Jur. N. S. 197.

(*m*) *M'Gachen v. Dew*, 15 Beav. 84; *Baynard v. Woolley*, 20 Beav. 583; *Bate v. Hooper*, 5 De G. M. & G. 338; *Raby v. Ridehalgh*, 7 De G. M. & G. 108; 3 Eq. R. 901. In the last case the tenants for life had not approved of the *particular investment* which constituted the breach of trust. It clearly appeared, however, that the investment on improper securities was owing to their solicitations.

(*n*) *Baynard v. Woolley*, 20 Beav. 583.

their *cestuisque trust*, sums of money that have been overpaid (*o*). The consequences of *acquiescence* in a breach of trust by the *cestuique trust* will be considered hereafter (*p*).

In express
trusts, lapse
of time no
bar.

LR 529
545

The possession of a trustee is, as between him and his *cestuique trust*, considered the possession of the latter, and consequently it cannot be *adverse* within the meaning of the Statute of Limitations. Where the trust is subsisting, and not determined by a final settlement of accounts or otherwise, no lapse of time can deprive the *cestuique trust* of his equitable remedy against the trustee. The Statute of Limitations, 3 & 4 Wm. IV. c. 27 (sec. 25), provides that time shall not run in the case of an express trust, unless there be a conveyance to a purchaser for valuable consideration, when it runs from the time of such conveyance. In trusts arising from construction or operation of law the Courts of Equity, as far as possible, adopt the rules applicable to legal remedies. Although not within the letter of the Statutes of Limitations, equitable remedies are considered to be within their spirit and meaning (*q*).

Honorary
nature of the
office.

THE OFFICE OF TRUSTEE IS AN HONORARY OFFICE :

(*o*) *Hood v. Clapham*, 19 Beav. 90.

(*p*) See next Chapter.

(*q*) Per Lord Redesdale in *Hovenden v. Annesley*, 2 Scho. & L. 633; vide *Beckford v. Wade*, 17 Ves. 97; *Cholmondeley v. Clinton*, 2 Ja. & W. 139. In the case of an express trust, where the person in possession of the trust estate is bound to pay off charges on the estate with interest, the remedy as between trustee and *cestuique trust* is unaffected by the Statutes of Limitation. *Gyles v. Gyles*, Dru. Rep. t. Napier, 259, and cases there cited.

No rule of equity is better established or more strictly adhered to, than that which prevents a trustee from deriving any profit from the trust. This rule is based upon a principle of natural justice :—“ THAT NO PERSON CHARGED WITH THE PERFORMANCE OF A DUTY SHALL PLACE HIMSELF IN SUCH A POSITION AS THAT HIS INTERESTS WILL CONFLICT WITH THAT DUTY (*r*). It is on this principle that a trustee for sale cannot himself become the purchaser of the trust estate ;—that a trustee of a leasehold property obtaining a renewal of the lease will be deemed to have obtained it for the benefit of his *cestuique trust* ;—and that a trustee buying in for less than the nominal amount, any demand to which the trust estate is liable, will not be allowed to retain the benefit of it (*s*). In all these cases the trustee is necessarily so circumstanced that he has peculiar means of acquiring knowledge, and opportunities of acting, all capable of being turned to profitable account ; and in order that this knowledge, and these opportunities, may be used for the advantage No profit

(*r*) Per Lord Cranworth, in *Broughton v. Broughton*, 5 D. M. & G. 160.

(*s*) *Fox v. Mackreth*, 2 Cox, 320; *Keech v. Sandford*, Ca. Ch. 61; 1 Le. Ca. Eq. 32, 105; *Fosbrook v. Balguy*, 1 Myl. & K. 226; *Barton v. Hassard*, 3 Dr. & W. 461; “One of the most firmly-established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves, that the Court will not inquire whether it has been done or not, but at once says that the transaction cannot stand.” Per Lord Eldon, in *Cook v. Collingridge*, Jac. 621.

The principle stated.

may be derived from the trust.

of the *cestuique trust*, the law prohibits him from deriving from them any personal advantage. A trustee is not allowed to profit directly or indirectly by the trust. Where a retiring trustee received a sum of money from his successor in consideration of his retirement, this sum was decreed to belong to the trust fund (*s*). If a person requested to act as trustee is not prepared to give his services gratuitously, he should decline the office at once. There is, however, nothing objectionable in his stipulating for a fixed percentage on rents and other moneys to pass through his hands ; and this, if expressly authorized by the instrument creating the trust, may be charged. It would be better in case of trusts of house property, for example, where much trouble is occasioned, if some such allowance were always provided. No right or privilege incidental to the trust estate, *if it possess any pecuniary value*, is allowed to be enjoyed by the trustee,—it must be made productive for the benefit of those whose interests the trustee is bound on all occasions to prefer to his own.

Lord Eldon directed that a right of sporting over the trust estate, if it possessed any pecuniary value, should be let—the trustee might appoint a gamekeeper for the preservation of the game, if necessary, but not for the purpose of his own pleasure (*t*). And in a much later case, where an advowson had been bequeathed on trusts

(*s*) *Sugden v. Crosland*, 3 Sm. & G. 192; and see *Vaughton v. Noble*, 30 Beav. 34, 39.

(*t*) *Webb v. Shaftesbury*, 7 Ves. 480.

for sale, and it then fell vacant, the right of nomination was held to belong, not to the trustee, but to the persons beneficially interested (*u*).

It follows, from the honorary nature of the office, that a trustee (or any person occupying a fiduciary position—as a solicitor or assignee), if he purchase up at an undervalue a debt or obligation affecting the property, will not be allowed the benefit of his bargain (*v*)—unless the *cestuisque trust* deliberately refuse to avail themselves of it (*x*).

On the principle above stated, it is not allowable for a trustee (or an executor, for in these particulars both offices are governed by the same general rules), to retain in his hands money which ought to be invested in Government securities, or otherwise applied for the benefit of the *cestuisque trust*. Where the trustee is not directed by the instrument creating the trust to apply sums of money in his hands in any particular way, he is bound, nevertheless, to secure to his *cestuisque trust* that annual return for their money which is afforded by the Government 3 per cent. Consols (*y*). A trustee retaining moneys in his hands unnecessarily, is liable to be charged with interest at a rate varying according to the circumstances of the case. In the ordinary case of a trustee not directed to apply funds in

Interest will
be charged
on money
retained.

Rate of in-
terest in the
discretion of
the Court.

(*u*) *Johnstone v. Baber*, 6 De G. M. & G. 439; see *Cooke v. Cholmondeley*, 3 Drew. 1.

(*v*) *Pooley v. Quilter*, 4 Drew. 184; 2 De G. & J. 327; *In re Johnston*, 7 Ir. Jur. N. S. 36.

(*x*) *Barwell v. Barwell*, 34 Beav. 371.

(*y*) See next Chapter.

any specific mode of investment, and omitting to make them productive, the Court usually requires interest at the rate of 4 per cent. (z). Greater severity has been exercised in several cases where the retention has been in express violation of the trust, and the trustee has been guilty of more than mere negligence ; in such cases the rate of interest charged has usually been 5 per cent. (a). In extreme cases, where grossly improper conduct has been established against the trustee, as, for instance, in making a profit out of the trust funds, in the face of an express trust to accumulate and invest, 5 per cent., with annual or half-yearly rests in the account (or compound interest), has been decreed (b). A trustee is considered to employ trust moneys for his own purposes if he lodge them to his credit at his banker's ; and more especially if he be a trader, on the ground that an augmented balance will in some degree assist in maintaining his credit, and an indirect benefit be thus obtained by this use of the trust funds (c).

(z) *Tebbs v. Carpenter*, 1 Mad. 290; *Rocke v. Harte*, 11 Ves. 60; *Mousley v. Carr*, 4 Beav. 49.

(a) *Picty v. Stace*, 4 Ves. 620; *Pocock v. Reddington*, 5 Ves. 794; *Crackett v. Bethune*, 1 Jac. & W. 586; *Heathcote v. Hulme*, ib. 222; *Jones v. Foxall*, 15 Beav. 392; *Knott v. Cottce*, 16 Beav. 77.

(b) *Raphael v. Boehm*, 11 Ves. 92; 13 Ves. 407, 590; *Walker v. Woodward*, 1 Russ. 107. In the latter case considerable profits were admitted to have been made, and the investigation of them being waived on account of the difficulty of making it, Lord Gifford directed five per cent. interest to be charged, with annual rests in the account.

(c) *Ex parte Hilliard*, 1 Ves. jun. 89; *Rocke v. Harte*, 11 Ves. 60.

The rules laid down as to the rate of interest with which a trustee is to be charged under given circumstances, have long been arbitrary, and not altogether reconcilable. They were reviewed by Lord Cranworth, C., in the case of the *Attorney-General v. Alford* (*d*) : his Lordship, in his judgment, asked—“What is the principle by which, in the case of executors and trustees having money in their hands which they ought to invest and do not invest, the Court is regulated in dealing with them in respect of interest, whether in charging them with interest at 4 or 5 per cent., or with compound interest at 5 per cent., or, under some circumstances, in making them liable for the amount of *consols* which would have been forthcoming if they had invested the fund properly?” His Lordship, after reviewing the cases, said—“What the Court ought to do, I think, is *to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received*, or which it is so fairly to be presumed that he did receive, that he is estopped from saying that he did not receive it.” Accordingly the defendant in this case, having retained trust funds in his hands for some years uninvested, and it not appearing that he had made any profit by so doing, was charged with simple interest at 4 per cent.

The result of the cases appears to be, that a trustee

(*d*) 4 D. M. & G. 843; varying decree of Stuart, V.-C. 2 Sm. & G. 488; see also the very recent case of *Blogg v. Johnson*, L. R. 2 Ch. App. 225.

will usually be charged with interest at 4 per cent. upon uninvested balances, except in the following cases, where the higher rate will be charged:—Where he might have received more; where he actually has received more; and where he must be presumed to have received more. And in case of a breach of trust or gross misconduct, the old rule that 5 per cent. will be charged must be regarded as still in force (e).

Cestuique trust entitled to profit made by use of trust fund.

Money used in trade.

If trust funds are so employed as to yield a higher rate of interest, the trustee will, of course, be liable to account to his *cestuique trust* for the whole. Where funds have been made use of by the trustee, in a trade or speculation of his own, the usual course has been to charge him with interest at 5 per cent., that being considered the usual rate of interest reserved on money used in commercial loans. All the former decisions bearing upon this point were considered by Lord Brougham, C., in a case where a testator directed that, in case his business were carried on, the profits of it were to be added to the rest of his property, and considered as part thereof. The trustees carried on the business, but when called on to account for the profits, refused to do so, and it was contended on their behalf that they were liable only to payment of the principal, with interest at 5 per cent. His Lordship, however, held that they were liable to account for the *profits ac-*

(e) *Penny v. Avison*, 3 Jur. N. S. 62; *Mayor of Berwick v. Murray*, 7 De G. M. & G. 519; *Townend v. Townend*, 1 Giff. 212. The accustomed rate of interest in Ireland is one per cent. higher than in England.

tually made; and in his judgment remarked upon the “clumsy and arbitrary method of allowing rests—in other words, compound interest—without the least regard to the profits actually realized,”^(f) and expressed disapproval of the decision in *Raphael v. Boehm* (*f*), “where compound interest was given, with a view to the culpability of the trustee’s conduct, and not upon any estimate of the profits he had made by it”^(g). It is now established, that under these circumstances the *cestuique trust* may elect to have the accounts taken for the entire period, and will be entitled to the profits made upon the trust fund; or, at his option, may claim interest at 5 per cent.^(h). Profit does not often arise from capital alone without regard to the skill and exertions of the merchant; and it has been decided that these circumstances will be taken into consideration, as well as the amount of capital employed (*i*). The difficulties in the way of ascertaining and apportioning the *profits* arising from money employed in trade are such as to render it prudent in ordinary cases for the *cestuique trust* to prefer a fixed rate of interest to an inquiry into the profits (*k*).

Either profit
or interest
may be
claimed.

Difficulty of
estimating
profits.

(*f*) 11 Ves. 92 (Lord Eldon).

(*g*) *Docker v. Somes*, 2 My. & K. 655; see *Robinson v. Robinson*, 1 D. M. & G. 257, per Lord Cranworth, L. J.

(*h*) *Heathcote v. Hulme*, 1 Jac. & W. 122; *Docker v. Somes*, *supra*; see *Williams v. Powell*, 15 Beav. 461; *Walrond v. Walrond*, 29 Beav. 586.

(*i*) *Willett v. Blanford*, 1 Hare, 253.

(*k*) *Wedderburn v. Wedderburn*, 4 My. & C. 41; *Crosley v.*

No compensation for loss of time.

On the principle above stated, it was very long since established that a trustee is entitled to no compensation for his trouble and loss of time (*l*). Nor is he allowed to charge for services rendered by him, professionally, in relation to the affairs of the trust. Thus, a trustee who is a solicitor is not permitted to charge more than *costs out of pocket*, for business done in connection with the trust (*m*). But if a trustee, being a solicitor, makes an express stipulation before accepting the trust for the usual professional fees he will be entitled to them (*n*) ; he will, however, be limited to charges for strictly legal business (*o*). On the same principle a trustee, or any person in the position of a trustee, being an auctioneer, will be disallowed his commission and other charges

Derby Gas Company, 3 My. & C. 428. Other cases as to charging interest under special circumstances, are *Saltmarsh v. Barrett*, 31 Beav. 349 ; *Shaw v. Turbett*, 14 Ir. Ch. Rep. 476. A trustee is bound to give information, and to produce his accounts to the *cestuique trust*, at reasonable intervals, *Freeman v. Fairlie*, 3 Mer. 43 ; *Springett v. Dashwood*, 2 Giff. 521, and cases there cited. Where the accounts between a principal and agent were long and complicated, and no fraud could be charged against the latter, the Court in a recent case declined to charge him with interest on the balances in his hands, *Turner v. Burkinshaw*, L. R. 2 Ch. Ap. 488.

(*l*) *Robinson v. Pett*, 3 P. W. 249 ; Wms. Exors. 5 edit. 1678 ; 2 Lc. Ca. Eq. 182.

(*m*) *Broughton v. Broughton*, 5 D. M. & G. 161.

(*n*) *Douglas v. Archbutt*, 2 De G. & J. 148.

(*o*) *Harbin v. Darby*, 28 Beav. 325.

(not being actual disbursements) for services rendered on the occasion of a sale of the trust estate (*p*).

The exceptions to the rule above considered are very few. Trustees managing estates in the West Indies are allowed a commission on the amount of rents, &c. received by them, so long as they are actually present and employed in the management (*q*). Executors appointed in the East Indies are also allowed a commission of 5 per cent. on moneys passing through their hands. These allowances are made on the ground that the difficulty of obtaining efficient services at so great a distance, renders inapplicable the rule which, in this country, requires a trust to be fulfilled gratuitously.

An executor who intends to avail himself of this right must, however, renounce any legacy that may have been given him by the will, as he will not be allowed to accept compensation provided by the testator, *in addition* to that allowed by law (*r*).

To the rule, depriving a trustee who acts as solicitor of all costs beyond actual disbursements, an exception has been made in the case of one of several trustees, who acts as solicitor in defending himself and his co-trustees, in a suit instituted against

(*p*) *Kirkman v. Booth*, 11 Beav. 273; *Mathison v. Clark*, 3 Drew. 3.

(*q*) See 5 Ves. 834; 9 Ves. 254, *et seq.*; 2 Mer. 68; *Denton v. Davy*, 1 Moore, P. C. 15, 32.

(*r*) *Chetham v. Lord Audley*, 4 Ves. 72; *Freeman v. Fairlie*, 3 Mer. 24. See *Matthews v. Bagshaw*, 14 Beav. 123.

them (s). “If a solicitor, being a trustee, be brought in and made a party to a suit, owing to his connexion with the trust, and the costs of the suit are not increased by any conduct of his own, there does not appear to be any reason why he should not be allowed his costs” (t). It is, however, clear that no professional charges, except those incurred in *defending a suit*, will be allowed to a solicitor who is trustee: and this was so stated in a later case (u), where the costs of a solicitor, being one of two trustees, incurred in the administration *out of court* of a trust estate, were disallowed by the V.-C. and afterwards (on appeal) by the Lord Chancellor; from whose judgment it may be concluded that the Court is not disposed to extend the exception in favour of solicitor-trustees (x).

(s) *Cradock v. Piper*, 1 Mac. & Gor. 664; 1 Hall & T. 617.

(t) Sir G. Turner in *Lincoln v. Windsor*, 9 Hare, 158.

(u) *Broughton v. Broughton*, 5 D. M. & G. 161; 1 Jur. N. S. 966.

(x) The decision in *Cradock v. Piper* is scarcely to be relied on. In a suit for administration, it appeared (on taxation) that one of the trustees was a solicitor, and that his defence had been conducted by his partner, and the Taxing Master allowed him only costs out of pocket. This ruling was affirmed by Sir J. Parker, V.-C., who said—“If ordinary costs were allowed in any case where a solicitor acts in a suit for himself alone, or what is the same in effect, acts for himself alone by his partner, it would be to destroy the rule altogether.”—*Lyon v. Baker*, 5 De G. & S. 622; and see *Manson v. Baillie*, 2 Macq. H. L. Ca. 80. A solicitor in partnership with a solicitor-trustee, although not allowed to charge for time and trouble on behalf of the firm, may however make the usual charges, if by special agreement the proceeds are to be carried to his own credit and not to that of

If the deed or will creating the trust, in distinct terms, authorize an allowance to the trustee for his care and trouble, either by way of commission on moneys administered by him, or by a fixed annual stipend or otherwise, he may of course avail himself of the proviso (*y*). Where the trust is likely to involve much loss of time, a trustee should stipulate for a proper allowance *before accepting it*; for after acceptance of it, any bargain with the *cestuique trust* will be looked upon as suspicious, and although not necessarily invalid, the circumstances attending it will be severely scrutinized. “The Court looks upon trusts as honorary, and a burden upon the honour and conscience of the person entrusted, and not undertaken upon mercenary views; and there is strong reason, too, against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a *cestuique trust*; and therefore this Court has always held a strict hand over trustees in this particular” (*z*). A solicitor undertaking the office of a

Or stipulated
for, before
acceptance of
it.

Agreement
by solicitor-

the partnership; *Claek v. Carlon*, 7 Jur. N. S. 441. Where one of three trustees, being a solicitor, received trust money, and neglected to apply it properly, the Court refused to regard him as the *agent* of his co-trustees, and held that they, having joined in the receipt merely for the sake of conformity, were not accountable for the loss. *In re Fryer*, 3 Kay & J. 317.

(*y*) *Willis v. Kibble*, 1 Beav. 559; *Re Sherwood*, 3 Beav. 341; *Bainbrigge v. Blair*, 8 Beav. 597; *Douglas v. Arehbutt*, 2 De G. & J. 148.

(*z*) Per Lord Hardwicke, in *Ayliffe v. Murray*, 2 Atk. 58; and see *Barrett v. Hartley*, L. R. 2 Eq. 789.

trustee for
full costs.

trustee should make a *special agreement for payment of his full professional charges* incidental to the execution of the trust: and it will be a proper precaution to have the *cestuique trust* informed of his strict rights under the rule of equity above referred to, by a separate professional adviser (*a*). Lord Langdale, M. R., refused to order taxation of a bill of costs paid to a trustee who had, before accepting the trust, signified his intention of charging full costs as between solicitor and client, and had taken a retainer so framed as to provide for those costs; and his Lordship laid great stress on the fact that the *cestuique trust* had been from the first aware of the rule of the Court, and had been informed of it by another legal adviser (*b*).

Allowance
under
special cir-
cumstances.

The rule above considered has seldom been relaxed by the Court of Chancery, and then under very peculiar circumstances. The principal instance is that afforded by *Marshall v. Holloway*, in which case Lord Eldon not only approved of an allowance to a trustee for his trouble, &c. for the future, but went so far as to direct an allowance for his *past services*. The circumstances were very special, and it was ad-

(*a*) To entitle the solicitor-trustee to such costs, there must be, in addition to a specific contract with the client, proof that the client is fully cognizant of his legal rights independently of the contract, and also cognizant of the effect of the contract upon such legal rights. Per Lord Cottenham in *Moore v. Froud*, 3 My. & C. 49.

(*b*) *In re Wyche*, 11 Beav. 209; see *Stanes v. Parker*, 9 Beav. 385; *Todd v. Wilson*, ib. 486.

mitted on all hands that the trustee in question was the only person properly qualified for the office (*c*). In general it is requisite for a trustee who finds himself called upon to fulfil duties of a laborious nature, without any provision having been made for compensating him for his loss of time, &c. to apply to the Court for relief *before accepting the trust*. After the burden of the trust has been accepted by him, he is not entitled to come to the Court, however arduous his duties may be: for he then has brought himself within the operation of the general rule, that a trustee (*i.e.* one who has accepted the obligation of the trust) is not entitled to compensation for personal trouble and loss of time (*d*).

A trustee will, however, be reimbursed *all charges and expenses properly incurred* in the execution of the trust; and where circumstances require it, he will not be prevented from employing the services of other

All reasonable charges and expenses will be allowed.

(*c*) The decree was to the following effect:—It being alleged Decree. that the aid of the trustee was indispensable, from his knowledge of the testator's affairs, and he refusing to act longer in the trusts without recompense, it was referred to the Master to settle a reasonable allowance to be made to the trustee for his time, pains, and trouble in the execution of the trusts for the time past; and the Master was directed to have regard to the legacy bequeathed to the said trustee. An inquiry was further directed, whether it would be for the benefit of the testator's estate that the trustee should continue to be a trustee under the will, and to receive a compensation for the future employment of his time and trouble. *Marshall v. Holloway*, 2 Swanst. 432.

(*d*) *Brocksopp v. Barnes*, 5 Madd. 90; and see *Bainbrigge v. Blair*, 8 Beav. 595.

persons at the expense of the trust fund. Although a solicitor himself, he will be at liberty to charge the trust fund with the cost of employing another solicitor in matters connected with the trust; and on all points of difficulty he is justified in obtaining the opinion of counsel (*e*).

Agents may be employed.

In the same way an accountant, agent, or bailiff may be employed *at a moderate rate of remuneration, to perform such duties as the trustee cannot reasonably be expected to perform in person* (*f*). By delegating part of his duties under such circumstances, a trustee or executor will not *necessarily* disentitle himself to any remuneration that may have been provided by the instrument creating the trust. Thus, where the trust estate consisted of a large number of houses let to weekly tenants, Sir J. Leach, M.R., allowed the trustees to retain a small annuity given them for their services, as well as to charge the estate with an agent's salary, and remarked that a provident owner might well act in the same way, and that the labour of collecting these rents could not fairly be imposed upon trustees (*g*).

Advances by trustee.

Advances may be made by the trustee where they are manifestly attended with benefit to the trust, as for example, where head rents of house property have to

(*e*) *Fearns v. Young*, 10 Ves. 184; *Macnamara v. Jones*, 2 Dick. 587. This follows from the nature of the trust, whether expressed in the instrument or not. Per Lord Eldon in *Worrall v. Harford*, 8 Ves. 8.

(*f*) *New v. Jones*, 9 Jarm. Prec. 338; *Weiss v. Dill*, 3 My. & K. 26.

(*g*) *Wilkinson v. Wilkinson*, 2 Sim. & S. 237.

be discharged or premiums paid in order to keep up insurances. The trustee may repay himself all such advances out of the funds, or they will be allowed for on a settlement of accounts, with interest at 4 per cent. (*h*).

By section 31 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), every deed or will creating a trust shall be deemed to contain a clause authorizing the trustee to reimburse himself, or pay and discharge out of the trust premises, all expenses incurred in or about the execution of the trusts. But this clause cannot be said to enlarge the powers of reimbursement always annexed to the office, and is therefore declaratory of the law.

A trustee may accidentally derive an advantage from his trust under peculiar circumstances, viz.—where, being himself at law owner of the estate, no person is existing who can establish a title to the beneficial interest. This question arose in the early case of *Burgess v. Wheate* (*i*). In that case lands were vested in A. and his heirs, upon trust, for B. and his heirs, and B. dying without heirs capable of inheriting, the Court held that the beneficial interest could not escheat to the Crown, there being a legal *terre-tenant*: and consequently the trustee was allowed to remain in possession until a better claimant should

Trustees' reimbursement.

Accidental benefit from want of title in any other person.

(*h*) *Small v. King*, 5 Bro. P. C. 72; Wms. Exors. 5 edit. 1686. In Ireland 5 per cent.

(*i*) 1 Eden, 177; and see the other cases cited Tudor, Le. Ca. Conv. 2 edit. 686.

appear. In such case the trustee will retain the estate merely for want of a title in any other person. As he has no positive right, but only a claim to hold in default of any better claimant, a Court of Equity will not aid him in establishing his demand, although, as legal owner, he may doubtless obtain the assistance of a Court of Law (*j*). The rule governing cases of this description was considered in *Rittson v. Stordy* (*k*), where a testator had devised real estate in trust for an alien. The person who would have been entitled in the event of intestacy filed his bill against the trustees of the will and the Attorney-General (representing the Crown), for a conveyance of the estate to him by the trustees. It was held that the devise in trust failed, and did not enure for the benefit of the Crown (*l*), and that the trustee could not claim to hold for his own benefit. The Vice-Chancellor said, "The claim of the trustee to hold for his own benefit, by reason of the want of any title in the alien or the Crown, could only prevail from *want of title in any one* to enforce the performance of the trust. If the devise be in favour of the alien, like any other devise of an equitable in-

(*j*) *Burgess v. Wheate*, 1 Eden, 177; *vide* 6 East, 431; 10 B. & C. 80; 3 Ves. 752.

(*k*) 3 Sm. & Giff. 230; 3 Eq. Rep. 1039; see also *Onslow v. Wallis*, 1 Mac. & G. 506; *Barrow v. Wadkin*, 24 Beav. 1; *Jones v. Noyes*, 7 W. R. 21.

(*l*) As to the claim of the Crown to *real or personal chattels* on the death of *cestuique trust* without next of kin, see 4 Hagg. 213; 14 Sim. 8; 3 Ves. 424; 3 My. & K. 492; *Ellcock v. Mapp*, 3 Ho. Lords Ca. 422.

terest which fails, it results to the person entitled to claim by descent, and on whom, according to law, the descent is cast. It is well settled by various cases, and recently by the decision in the House of Lords, in *The rule.* *Ellcock v. Mapp* (*m*), that *a trustee cannot claim to hold for his own benefit where the instrument which creates his estate expressly says that he is to hold as a trustee merely, if there be any person to whom, by operation of law, the beneficial estate results.*"

A trustee should always remember that his first and chief duty is to carry out the trust: and he is under no obligation to look closely into the circumstances of its creation. He may assume that all things were rightly done up to the time when he became connected with it, and that the trust was validly created (*n*). Nor is it any part of his duty to scrutinize the title of the trust property; and if he should have any suspicion that the title is defective, he will not be justified in communicating it to any other person, who might set up a claim hostile to that of the *cestuique trust*.

Trustees, who are solicitors, are not only answerable to the law as are other trustees, but they are especially under the control of the court of which they are officers. A solicitor who wilfully advises a breach of trust renders himself liable to be struck off the Roll (*o*); and a

Special reme-
dies against
solicitor-
trustees.

(*m*) 3 Ho. Lords Ca. 492.

(*n*) *Beddoes v. Pugh*, 26 Beav. 407. The case may be different if the trustee receive notice of a claim paramount to the trust. *Neale v. Davies*, 5 D. M. & G. 258; see pp. 156, 158, *post*.

(*o*) *Goodwin v. Gosnell*, 2 Coll. 457, see 462.

solicitor who himself commits a breach of trust, is still more liable to this penalty (*p*) ; but the misconduct must be glaring before the Court will inflict it, as there is an unwillingness to apply the general jurisdiction of the Court to solicitors in the capacity of trustees (*q*).

Prior to the year 1858 there existed no remedy against a trustee guilty of a fraudulent misappropriation of trust funds, except such as a suit in Chancery afforded. Statute 20 & 21 Vict. c. 54 (*r*), first rendered the fraudulent trustee and his heir and representative amenable to the jurisdiction of a criminal court. The Criminal Law Consolidation Act, 24 & 25 Vict. c. 96, repealing the last-mentioned act, but re-enacting its provisions, enacts that whosoever being a trustee of any property shall, with intent to defraud, convert or appropriate the property of which he is trustee to or for his own use or purposes, or shall with such intent dispose of or destroy such property, he shall be guilty of a misdemeanor, and be liable to be kept in penal servitude for three years, or suffer such other punishment [by penal servitude or imprisonment, with or without hard labour, or by fine, as in sect. 75 of the act], as the court shall award. But no prose-

(*p*) *Thompson v. Finch*, 25 L. J. Ch. 681 ; *In re Chandler*, 2 Jur. N. S. 366 ; *In re Hall*, 2 Jur. N. S. 633. A solicitor who without being a trustee has assumed to act as one, is accountable on that footing for a breach of trust. *Morgan v. Stephens*, 9 Jur. N. S. 701.

(*q*) *Re Blanchard*, 9 W. R. 647 ; 30 L. J. Ch. 516.

(*r*) Repealed, but in substance re-enacted by 24 & 25 Vict. c. 96, ss. 80—86:

cution under this act is to commence without the sanction of the attorney-general; nor, where civil proceedings have been taken, without the sanction of the Court where the same are pending. No remedy at law or in equity is to be affected, nor is the act to prejudice any agreement entered into or security given by any trustee having for its object the restoration or repayment of any trust property misappropriated. A trustee is defined by the interpretation clause as a trustee on some express trust created by some deed, will or instrument in writing, and also the heir or personal representative of any such trustee.

Where a trustee paid a sum of trust money into his bankers, and then drew out nearly the entire, and paid a private debt with a part, the Court sanctioned proceedings against him under this act (s).

(s) *Wadham v. Rigg*, 1 Drew. & Sm. 216.

CHAPTER V.

OF THE DUTIES AND LIABILITIES OF TRUSTEES OF PERSONAL PROPERTY.

Ordinary
duties of
trustee of
stock.

THE duties ordinarily imposed upon the trustee of a settlement of stock or other personal property, are of such a nature as easily to be performed: nor does their exercise involve the trustee in the dangers to which the trustee of a will, ignorant of the doctrines of Equity, is peculiarly exposed. Where stock forms the subject-matter of the trust, the first point to be attended to is to ascertain that the stock is regularly transferred into the name of the trustee (*a*). His subsequent duties, during the continuance of the trust, unless there be a change of securities, will not ordinarily be more onerous than the payment of the dividends or annual proceeds to the party entitled to receive them; and this may, in most cases, be effected by means of a power of attorney to receive dividends,

(*a*) The trustee must not be content with a statement or recital that the stock is transferred, but for his own protection must obtain distinct evidence of the fact; *Story v. Gape*, 2 Jur. N. S. 706. As to the duties of a trustee to inquire into and enforce the security of trust property, see the recent and very important case of *Macnamara v. Carey*, 1 Ir. Rep. Eq. 9.

executed in favour of the person having the life interest in the stock, and used by him from time to time as dividends fall due.

When the beneficiary or person interested in Government Stock standing in the name of a trustee, is apprehensive that a breach of trust is likely to be committed by the latter, his course will be to issue a writ of *distringas* (*b*), grounded upon an affidavit. This will prevent, in effect, any dealing with the stock until the Court shall have made its order; for immediately on the trustee taking any step to transfer, the Bank gives notice to the party who served the *distringas*, who must then at once institute his suit and obtain an injunction (*c*).

Where the settlement contains no power for varying securities, the trustee is bound to retain the fund exactly in its original state, and he must resist all solicitations of persons interested, having for their object a change into unauthorized securities, which promise a higher rate of interest (*d*).

The greater difficulties to be contended with by the trustee of a will, arise partly from the various kinds

Distringas on
stock in
trustee's
name.

(*b*) This writ is issued under the authority of stat. 5 Vict. c. 5, ss. 4, 5. For the form of affidavit, and the procedure thereon, see XXVII. Consol. Ord. Ch.

(*c*) The nature and effect of the *distringas* were explained by V.-C. Wigram in *Re Marquis of Hertford*, 1 Ha. 584. If the "right of survivorship" were by law excluded as between trustees, a far more simple and effectual check upon fraud would exist.

(*d*) *Angell v. Dawson*, 3 Y. & Coll. 316.

*Duties of
trustee of a
will.*

of property with which he will, in ordinary cases, find himself entrusted ; and partly from the frequent absence of directions as to the time and manner of calling in, and investing the proceeds of the residuary estate on permanent securities. It cannot be too frequently impressed on trustees that the *absence of express directions* on this subject does not invest them with any discretion : so far as the instrument creating the trust is silent, the acts of the trustee must be regulated by those strict rules of Equity which are binding upon all trustees alike, regardless of any *general* terms in the instrument, giving an apparently unlimited discretion as to the management and investment of the fund.

The first duties of the trustee of a will are to reduce into possession all outstanding property, to sell property of a fluctuating or deteriorating kind (*d*), to call in debts and other *chooses* in action of the testator, and to convert all personality not specifically bequeathed into money. These duties must be performed with all possible expedition, and a direction in the will to "call in with all convenient speed" will add nothing to the obligation imposed by law on every executor and trustee to do so (*e*). Where legal proceedings are necessary, they must be resorted to, but the trustee who has made every exertion to recover outstanding debts, will not be held accountable in the

(*d*) *Cafe v. Bent*, 5 Ha. 35, and the other cases cited in notes to *Howe v. Dartmouth*, 2 Le. Ca. Eq.

(*e*) Per Lord Cottenham, *Buxton v. Burton*, 1 Myl. & C. 80.

Reduction
into posses-
sion.

event of his efforts proving unsuccessful (*f*). Money left outstanding on personal security must be called in, notwithstanding that the security has been selected and approved by the testator ; for after his death the Court of Chancery does not admit of the exercise of a similar discretion by his trustee (*g*). In general, the entire personal estate is to be called in, and placed in a state of permanent security, within twelve months from the testator's decease ; and a trustee will, in general, ~~not~~ be liable for losses consequent on shares of a fluctuating and speculative character not having been sold within the twelve months (*h*).

(*f*) Where it is the duty of an executor (or trustee) to obtain payment of a sum of money, he is exonerated, though he take no steps at all, provided it appears that if he had done so they would have been, or there is reasonable ground for believing they would have been, ineffectual ; per Sir J. Romilly, M. R., in *Clack v. Holland*, 19 Beav. 271, 272. The *onus* will lie on the trustee to show that his efforts would have proved unsuccessful. *Stiles v. Guy*, 16 Sim. 230. See *Alexander v. Alexander*, 12 Ir. Ch. Rep. 1.

(*g*) *Bailey v. Gould*, 4 Y. & Coll. 221 ; *Clough v. Bond*, 3 Myl. & C. 490.

(*h*) *Hood v. Clapham*, 19 Beav. 90 ; *Hughes v. Empson*, 22 Beav. 181 ; *Grayburn v. Clarkson*, 2 W. N. 29. By a settlement a sum of money due from A. was vested in A. and B. as trustees on trust with all convenient speed to get in and invest in consols. For two years and a half B. took no steps to realize, and at the end of that time A. became a bankrupt. It was held that B. was liable to make good the loss ; *Grove v. Price*, 26 Beav. 103. As to the right of the *cestuique trust* himself to take active measures towards getting in *chooses in action*, see *Murkyn 1868/13*

The duties and liabilities of trustees of personalty were discussed in the case of *Clough v. Bond* (*i*). Lord Cottenham said: "It will be found to be the result of all the best authorities on the subject, that, although a personal representative acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested in the funds, or upon securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such trustee will be liable to make it good, however unexpected the result, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable (*k*); or if he leave money due upon personal

Paddon v. Richardson, 7 D. M. & G. 563. A trustee will be liable for the loss occasioned by his not having taken active measures to place the trust property in a state of security, *e. g.*, for omitting to have a settlement of property in Ireland duly registered. *Macnamara v. Carey*, 1 Ir. Rep. Eq. 9.

(*i*) 3 Myl. & C. 490, *vide* 496. Here the liability of an administratrix came in question; but the office of trustee in these particulars resembles that of personal representative.

(*k*) *Phillips v. Phillips*, Freem. C. C. 11.

security, which, though good at the time, afterwards fails (*l*). And the case is stronger if he be himself the author of the improper investment, as upon personal security or an unauthorized fund."

In the absence of any direction to the contrary, a trustee may safely permit funds to remain invested on good real securities. It is, indeed, his duty to leave them in that state of investment, unless the money be actually required for some purpose connected with the trust, or some other circumstance arise to render the calling in of the fund desirable (*m*). It is difficult to lay down any rules on a subject as to which the discretion of the trustee must in the main guide him. From the expressions made use of by the Court of Appeal, in the case of *Robinson v. Robinson* (*n*), it may, however, be inferred that where the discretion of the trustee is not controlled by the terms of the instrument creating the trust, he will be justified in leaving funds outstanding upon such real securities, permanent in their nature, as may have been approved of by the testator as eligible modes of investment. But a trustee, before leaving money outstanding on mortgage, should take some steps to satisfy himself that

As to calling
in real
securities.

(*l*) *Powell v. Evans*, 5 Ves. 839; *Tebbs v. Carpenter*, 1 Mad. 290.

(*m*) *Orr v. Newton*, 2 Cox, 274.

(*n*) 1 D. M. & G. 247. In this case *Turnpike bonds* were held to be real securities, and such as trustees are justified in not calling in. Lord St. Leonards thinks that railway debentures are not "real securities," Handy Book, 7th ed. 198.

the security is *prima facie* good and sufficient (*o*) ; and if its sufficiency be questionable, he should lose no time in calling it in, even against the wish of the tenant for life of the fund, and although the investment was approved of by the creator of the trust (*p*).

Trustees directed to invest "on real security by way of mortgage of any freehold, copyhold, or leasehold hereditaments" are not justified in vesting on railway mortgages (*q*). Nor will a power to lend on real securities justify an investment on the security of a judgment registered against the debtor's lands (*r*) ; nor on the security of a lease for lives, where a policy of assurance will in effect form the chief item in the security (*s*). A long term of years, at a nominal rent, may perhaps be regarded as substantially, though not technically, equivalent to a fee simple (*t*).

Payment of a
mortgage to
a trustee.

A mortgagor should refuse to pay the mortgage money to a trustee, if he has reason to know that the latter is about to misapply it (*u*) ; and in any case of payment he should make the payment to the trustee himself, and not to his agent, or even to his solicitor,

(*o*) *Ames v. Parkinson*, 7 Beav. 384.

(*p*) *Harrison v. Thexton*, 4 Jur. N. S. 550.

(*q*) *Mortimore v. Mortimore*, 28 L. J. Ch. 558 ; *Harris v. Harris*, 9 W. R. 444.

(*r*) *Johnston v. Lloyd*, 7 Ir. Eq. Rep. 252.

(*s*) See *Lander v. Weston*, 3 Drew. 389 ; *Fitzgerald v. Fitzgerald*, 6 Ir. Ch. Rep. 145.

(*t*) *Townend v. Townend*, 1 Giff. 211.

(*u*) *Fernie v. Maguire*, 6 Ir. Eq. Rep. 137.

although holding the deed and the receipt of the trustee for the money (*x*).

Where money is to be paid over, a trustee does not incur risk by allowing his co-trustee to receive a payment, but he is bound to leave it there no longer than necessary; and in such case, the better course is to have the money lodged in a bank to the credit of the trustees jointly (*y*).

By section 23 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), it is declared that the *bonâ fide* payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security. It is doubtful whether this section applies to trusts created prior to August, 1859—the passing of the Act.

Section 29 of Lord Cranworth's Act (23 & 24 Vict. c. 145) enacts that the receipts in writing of any trustee for *any money* payable by reason of any trusts or powers shall be good discharges. The operation of

(*x*) Lord St. Leonards' Handy Book, 7th ed. 109, 199.

(*y*) In several recent cases in Ireland where the power of trustees to give receipts has come under consideration, a distinction has been drawn between monies which are pure personality, and monies payable on sales or mortgages; *Ford v. Ryan*, 4 Ir. Ch. Rep. 342; *Fernie v. Maguire*, 6 Ir. Eq. Rep. 137: but it seems doubtful whether the distinction is established, see Lewin on Trusts, 5th ed. 240.

this Act is expressly limited to trusts created since 28th August, 1860. As neither of the foregoing enactments is retrospective, it will for many years be necessary to inquire into the power of trustees to give valid discharges for purchase money.

Investment
on personal
security.

It has long been settled law (some early decisions to the contrary, notwithstanding) that nothing short of an express authority in the deed or will, can justify trustees in lending upon the personal security of one or of any larger number of persons, however unimpeachable their credit (*z*). General expressions conferring upon the trustees an unlimited discretion, as to the mode of investment, will not justify them in so doing. It is equally certain that express words authorizing loans on personal security, will not warrant them in lending to one of their own number (*a*). A power of making investments on securities not approved of by the Court of Chancery will be strictly construed, and all its terms and conditions must therefore be followed closely in exercising it; where (for example) trustees are authorized, on obtaining the consent of particular persons, to invest on personal security, the required consent must be obtained *before* the investment be made (*b*).

(*z*) 2 Story Eq. Jur. § 1274 (2nd edit.) Trustees may of course lend on personal security where expressly authorized by the terms of the trust. *Paddon v. Richardson*, 7 D. M. & G. 563.

(*a*) *Pocock v. Reddington*, 5 Ves. 794; *Stickney v. Sewell*, 1 My. & C. 14.

(*b*) *Cocker v. Quayle*, 1 Russ. & M. 535; *Payne v. Collier*, 1 Ves. jun. 170; *Bateman v. Davis*, 3 Mad. 98. In the latter

Where trustees are expressly directed to invest on personal securities, or are "required" to invest on the application of specified individuals, all discretion is of course taken away ; and the trustee is bound to act in conformity with the words of the instrument, without regard to other considerations (c).

In the absence of an express direction it is not competent for trustees, although empowered to invest "at their discretion," to adopt any other mode than that sanctioned by the Court. The fund long selected by the Court was the 3 per cent. *consols*; trustees could always avoid liability by investing in this fund, and for its fluctuations they never were held liable (d).

Rule as to
investment
in 3 per cent.
consols.

case it was held that a *subsequent* consent by the wife would not suffice, where by the terms of the settlement the consent was required *prior* to the investment. In *Wiles v. Gresham*, 5 D. M. & G. 770, trustees authorized, with the consent of husband and wife, to leave funds outstanding on personal security, and with such consent to call them in, were held not to have committed a breach of trust in leaving a fund, *without* such consent, in the hands of the husband, where it was speedily lost by his bankruptcy. And it was held that on that event it became the duty of the trustees to call in the amount without obtaining any consent, and as they had omitted to do so, they were held liable to replace the fund : as to obtaining the wife's consent to a particular investment, see *Child v. Child*, 20 Beav. 50.

(c) *Forbes v. Ross*, 2 Bro. C. C. 430 ; *Cadogan v. Essex*, 2 Eq. Rep. 551.

(d) *Peat v. Crane*, 2 Dick. 499 ; *Clough v. Bond*, 3 Myl. & C. 496 ; *Bate v. Hooper*, 5 D. M. & G. 338. "This obligation—not the result of any positive law—has been imposed on trustees generally by the Court as a *convenient rule*, affording security to the *cestuique trust*, and presenting no possible diffi-

It is not allowable for a trustee to invest in stock or shares of any kind except those authorized by the order of the Court (*e*), or in the funds of any foreign Government.

Any loss consequent upon an unauthorized investment will have to be made good by the trustee, while any profit arising therefrom must be accounted for to the *cestuique trust* (*f*).

Recent Acts
as to investments.

Until lately trustees were not justified in investing trust money (in the absence of special directions) in any fund but the 3 per cent. consols. But section 32 of stat. 22 & 23 Vict. c. 35 (Lord St. Leonards' Act), authorizes a trustee, executor, or administrator, unless expressly forbidden so to do, to invest any trust fund on *real securities* in any part of the United Kingdom, or in *Bank Stock* or *East India Stock* (*g*), and the trustee shall not on that account be held liable for a breach of trust, provided that such investment shall in other respects be reasonable and proper (*h*).

This Act not being retrospective, an Amendment Act

culty to the trustee," per Lord Cranworth in *Robinson v. Robinson*, 1 D. M. & G. 247.

(*e*) *Trafford v. Boehm*, 3 Atk. 444; *Hove v. Dartmouth*, 7 Ves. 150.

(*f*) *Crawshay v. Collins*, 15 Ves. 218.

(*g*) The meaning of the word "East India Stock" is defined by stat. 30 & 31 Vict. c. 132. See page 124, post.

(*h*) See Lord St. Leonards' remarks on this section, page 125, post. The material clauses of both these Acts will be found in the Appendix.

was passed, 23 & 24 Vict. c. 38, rendering by sect. 12 the former Act retrospective ; and by sect. 10 empowering the Court of Chancery to issue General Orders from time to time as to investment of cash under its jurisdiction in such funds as the court shall think fit ; and all trustees, executors, and administrators having power to invest in government securities, may invest in any of the funds and securities to be named in such General Order.

By General Order of the Court of Chancery in England, of 1st February, 1861, the following funds and securities are specified ; and application may be made to the Court for conversion of consols into any of them, viz. :—Bank Stock, East India Stock, Exchequer Bills, and £2 : 10s. Annuities, Mortgage of Freeholds and Copyholds in England and Wales, also the Consolidated, Reduced, and New Three per Cent. Annuities.

General
Orders of
Court.

The General Order of the Court of Chancery in Ireland under the act, on the 24th May, 1861, differs slightly from the above, as it authorizes the investment only in Bank of Ireland Stock, and on mortgage of freehold and copyhold (*i*) estates in Ireland.

The second clause of both the foregoing General Orders is to the following effect :—Every petition for the conversion of any Government stock into any other of the stocks, funds, or securities above men-

(*i*) Notwithstanding this general order, there are not, as a fact, any copyhold estates in Ireland. The general orders will be found in the Appendix.

tioned, "shall be served upon the trustees (if any) of such stock, and upon such other persons as the Court shall think fit."

East India Stock.

An Act has just been passed (*j*) for the purpose of explaining the meaning of the words "*East India Stock*" in the above act. It is declared that those words include as well the East India Stock which existed prior to 1859, as East India Stock charged on the revenues of India by Act of Parliament in or after 1859. This Act also (sect. 2), empowers every trustee to invest any trust fund in his possession or under his control in any securities, the interest of which is or shall be guaranteed by Parliament, to the same extent and in the same manner as he may invest trust fund in the securities mentioned in the first Act.

Lord St.
Leonards on
the late Acts.

Lord St. Leonards thus summed up the law as to the investment of trust funds (*k*) :—

"Now the law stands thus :—By the 32nd section

(*j*) 30 & 31 Vict. c. 132. This act (which will be found in the Appendix) was rendered necessary by the continued uncertainty as to what East Indian Stocks were authorized.

It is entirely in the discretion of the court whether an application to convert government funds into any other funds or securities shall be granted ; and it seems that unless there are special reasons for the change of investment, and it appears that the tenants for life will not be benefited at the expense of the remaindermen, the court will be unwilling to sanction the change of investment. See Lewin on Trusts, 5th ed. 254, and cases there cited. The decisions on the meaning of the words "*East India Stock*" will also be found there ; as all doubt on this point is now removed it is unnecessary to refer to them further.

(*k*) In the "Times," 29th August, 1860.

of the 22nd & 23rd Vict. c. 35, where a trustee is not, by some instruments creating his trust, expressly forbidden to invest any trust fund or real securities in any part of the United Kingdom, or in the stock of the Bank of England or Ireland, or in East India Stock, it is lawful for him to invest such trust money in such securities or stock, provided that such investment shall in other respects be reasonable and proper ; and by the 12th section of the 23rd & 24th Vict. c. 38, this clause is made to operate retrospectively.

“ By the last-mentioned Act the Lord Chancellor is empowered to make such general orders as to the investment of cash under the control of the Court, either in the Three per cent. Consols, or Reduced, or New Bank Annuities, or in such other stocks, funds, or securities as he shall see fit ; and power by the same Act is given to the Lord Chancellor to convert any Three per Cent. Bank Annuities, standing or to stand in the name of the accountant-general of the Court in trust in any cause or matter, into any such other stocks, funds, or securities, upon which, by any such general order as aforesaid, cash under the control of the Court may be invested. The orders for conversion are to be made upon the petition of any of the parties interested.

“ By the same Act, trustees having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds, or securities, may invest them in any of the stocks, funds, or securities in or

upon which by such general order cash under the control of the Court may be invested.

"The result is, that trustees (including executors and administrators) may, unless forbidden by their trusts, invest the trust fund in real securities in Great Britain or in Bank Stock of England or Ireland, or in East India Stock. The Court itself can invest cash in such stocks, funds, and securities as it shall see fit, and make a general order for the purpose; and upon the petition of parties interested, Three per Cents. may be converted by the Court into such securities as cash may be invested upon under any general order; and trustees, with the usual powers to invest, may resort to the same securities."

Change of investment will not be made by the Court merely to produce a larger income.

On the construction of these Acts, it is held that the change of investment is in the discretion of the Court, and that, in the absence of special circumstances which might make the proposed change beneficial to those entitled in remainder, the transfer ought not to be permitted (*l*). Also, it seems that whenever the fund having the lower rate of interest does not produce sufficient income to fulfil a primary purpose of the trust, the Court will be disposed to change the investment (*m*). The mere expectation of an increased income to the persons having a life interest is not sufficient to warrant the application to the Court;

(*l*) *Cockburn v. Peel*, 3 D. F. & J. 170.

(*m*) See 2 Daniel Ch. Pr. 1629.

and Bank Stock, although a safe investment, is less eligible, as being more liable to fluctuations, than 3 per cent. stock (*n*).

It has frequently been questioned whether, in the absence of express authority, a trustee would be justified in investing on good real security? The current of modern authorities was opposed to such an investment; and Sir G. Turner, L. J., characterized this question as "one of difficulty, on which he did not mean to give any conclusive opinion. He did not, however, hold out any encouragement to the notion that trustees, to whom no power for that purpose was given, were justified in so doing" (*o*). It has been seen that pursuant to the late Acts investments in mortgages are now authorized by order of the Court.

Trustees of settlements and wills are now therefore at liberty to invest on good freehold security. It is generally understood that, in so doing, they are not justified in lending to a greater amount than *two-thirds* of the value of land, or more than *one-half* of the value of house property or other buildings (*p*).

Trustees authorized to lend on real securities in England, Wales, or Great Britain, may, under the Act authorizing loans in Ireland.

(*n*) *In re Boyce's Minors*, 1 Ir. Rep. Eq. 47.

(*o*) In *Raby v. Ridchalg*, 3 Eq. Rep. 901; 1 Jur. N. S. 473. See Lord St. Leonards' Handy Book, 7th ed. 198.

(*p*) *Stickney v. Sewell*, 1 My. & C. 9; *Stretton v. Ashmall*, 3 Drew. 9. In the former case it was decided that trustees are not authorized in lending to a co-trustee, even upon unexceptionable security; and see *Fletcher v. Green*, 33 Beav. 426.

statute 4 & 5 Will. IV. cap. 29, lend upon real securities in Ireland (*q*) ; but if any infant, unborn child, or insane person, be interested, the investment must be made under the direction of the Court of Chancery ; and the consent of every person will be required, whose consent is requisite in loans not under the Act ; nor does the Act apply where there is an express restriction against such loans. The last clause has given rise to the practice usual with conveyancers, of introducing words prohibitory of investments on land in Ireland. The application to the Court (where rendered necessary by the circumstances of the *cestuique trust*) may be made either in a cause, or by petition in a summary way (*r*).

The Land Improvement Act.

By the Land Improvement Act (27 & 28 Vict. c. 114, ss. 60, 61) trustees having a power to lend on real securities are authorized to invest on charges under the Act or mortgages thereof. But this appears not to extend to trusts created before the passing of the Act (29th July, 1864).

Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 25) enacts, that trustees having trust money which it is their duty to invest at interest, may at their

(*q*) The term "Real securities in Ireland" is held to include leaseholds for lives renewable in perpetuity, subject to a head rent and to fines on renewal. *M'Leod v. Annesley*, 16 Beav. 600.

(*r*) *Stuart v. Stuart*, 3 Beav. 430. See *Ex parte Pawlett*, 1 Ph. 570. Trustees are now expressly empowered to lend on mortgage in any part of the United Kingdom by stat. 22 & 23 Vict. c. 35, s. 32, and orders thereunder ; see p. 122—126, *ante*.

discretion invest the same in any parliamentary stocks, or public funds, or government securities; and may also, at their discretion, call in and re-invest the same, and vary any such investments for others of the same nature; provided that no such original investment (except in Three per Cent. Consols) and no change of investment as aforesaid shall be made where the tenant for life is under no disability, without the consent of the tenant for life. The object of this section is to render it unnecessary hereafter to insert the usual powers for varying securities in deeds and wills; and it applies only to trusts created subsequently to August, 1860.

Where the trust fund is invested on mortgage security, it is the usual practice, in framing the deed, to keep the trust out of sight, in order that the mortgagor may not, on repayment, be bound to see to the application of the money. A declaration is often found inserted in a mortgage by trustees, to the effect that the advance is made by them *on a joint account*, and that the receipt of the survivors or survivor of them shall be a sufficient discharge. As to trusts created since August, 1859, the trustees' receipts are rendered effectual by sect. 23 of Lord St. Leonards' Act (22 & 23 Vict. c. 35).

Trustees about to lend on mortgage should be cautious to have the sufficiency of the security ascertained by the report of duly qualified surveyors. A remarkable instance of the neglect of this precaution

Mortgage by
trustees.

Should be
after due
inquiry as to
value.

occurred in a case in the Rolls (*s*), where a sole trustee had been induced to lend upon the security of lands held under lease renewable in perpetuity subject to a rent. The value of the property had been grossly misrepresented, and the trustee does not appear to have made sufficient inquiry as to the real value, or to have had an impartial survey made. The property was afterwards sold for a sum considerably under the amount of the mortgage; and on a bill filed by the *cestuique trust*, the trustee was declared liable to make good the loss. It would appear from the same case, that on property of this description (as on house property and ordinary leaseholds) not more than *one-half* of the estimated value should be advanced (*t*).

Investments
on leasehold's
and house
property.

An investment of trust money on leaseholds, unless there be an express power to invest on such security, is also a breach of trust. Where the power authorizes it, care should be taken, as in case of loans on house property, and on renewable interests, to allow an ample margin for depreciation, &c. More than one-half of the value cannot, in general, be advanced without risk. In one case, trustees having been directed to invest on *good* and *approved* freehold or leasehold securities, it was found that £2,600 had been lent on mortgage of four freehold messuages,

(*s*) *M'Leod v. Annesley*, 16 Beav. 600.

(*t*) See *Stretton v. Ashmall*, 3 Drew. 9. The *onus* is on trustees lending on unauthorized securities, to show that the value is sufficient.

two of which were unfinished and unoccupied,—the property having been previously valued by a surveyor at the sum of £3,500 and the annual rental estimated at £175. On a sale a considerable sum was lost, and it appeared that the rent received from the property, at the time of the loan, was no more than £105 per annum, and that the property was altogether of a speculative character. The trustees were, however, admitted to have acted *bond fide*, and the Vice-Chancellor declined to charge them with the loss, and gave them costs of the suit (*u*).

No other reported case exhibits such leniency towards trustees; and it is not surprising to find that the decree was reversed on appeal. Unfortunately no report of the appeal can be found.

Trustees cannot be advised to lend on second mortgage, as the legal estate will not be vested in them, and they will probably be unable to secure possession of the title deeds. A second mortgagee is also liable to be embarrassed by the proceedings of the first mortgagee, in case the latter should institute proceedings to foreclose, or should exercise his power of sale (*x*). Second mortgage.

An advance on a second mortgage of house property having been followed by a considerable loss, the trustees endeavoured to shield themselves by a

(*u*) *Jones v. Lewis*, 3 De G. & S. 471; reversed, Chitty Eq. Index, 3,555.

(*x*) *Robinson v. Robinson*, 16 Jur. 256; *Waring v. Waring*, 3 Ir. Ch. Rep. 337; *Lockhart v. Reilly*, 1 De G. & Jon. 476.

clause in the trust deed, declaring that they were not to be liable for insufficiency or deficiency in value of any securities, except through their wilful default. This clause was held to afford them no protection against the consequences of the breach of trust (*y*).

Lending on the security of a judgment.

In England a judgment cannot be regarded as a security for money. In Ireland it sometimes becomes so ; and it is therefore as well to remind the trustee that judgments obtained prior to July, 1850, must be re-registered every five years to preserve their priority as against subsequent mortgagees and purchasers for value. Judgments obtained in Ireland since July, 1850, are not charges on the debtor's lands unless registered by a properly framed affidavit in the office for registering deeds. If the amount be lost through the neglect of the trustee to register or re-register the judgment, he will be held responsible for the loss (*z*). It is almost superfluous to say that no trustee should ever lend on the security of a judgment, although registered, for it can only attach to whatever interest the debtor has (*a*) ; and is for other reasons a security of the most objectionable kind.

(*y*) *Drosier v. Brereton*, 15 Beav. 221. It appears from this case that in charging trustees for breaches of trust, it is immaterial how the trust was created.

(*z*) *Lester v. Lester*, 6 Ir. Ch. Rep. 513, recognized by the Irish Court of Chancery Appeal in *Maenamara v. Carey*, 1 Ir. Rep. Eq. 9, a case of great importance as regards the active duties of trustees to secure the trust property. All the cases are there collected.

(*a*) *Eyre v. McDowell*, 9 H. of L. Ca. 619.

Where trustees improperly retain in their hands money which they are, by the terms of the trust, required to invest in the Government funds, the *cestuique trust* has the option of charging them with the money so retained, and interest: or with the amount of stock that would have been purchased, had the investment been properly made (*b*).

Where trustees, directed to invest in the Government funds, or on real security, have done neither, they have in some instances been held answerable, at the option of the *cestuique trust*, for the principal money with interest, or for such a sum of 3 per cent. consols as would have arisen from the investment. Under similar circumstances, however, Sir J. Leach declared the trustees liable only for the principal money and interest, observing, that "if real security had been taken, the principal money only would have been forthcoming to the trust, and the want of real security is all that is imputable to the trustees" (*c*). All uncertainty on this point is now ended by the judgment of the Court of Appeal in *Robinson v. Robinson* (*d*). In this case the testator

Money
directed to
be invested
in the funds.

In the funds
or on real
securities.

(*b*) *Shepherd v. Mouls*, 4 Hare, 304; *Robinson v. Robinson*, 1 D. M. & G. 247, per Lord Cranworth.

(*c*) *Hockley v. Bantock*, 1 Russ. 141; *Watts v. Girdlestone*, 6 Beav. 188; *Ames v. Parkinson*, 7 Beav. 379; *Marsh v. Hunter*, 6 Mad. 295. This decision was followed by Sir James Wigram, V.-C., in *Shepherd v. Mouls*, 4 Hare, 500. 2 Lead. Ca. Eq. 648.

(*d*) 1 D. M. & G. 247. In the judgment of Lord Cranworth, L. J., most of the doctrines now prevailing on the subject of

had directed his trustees to invest in parliamentary stock or funds, or in real securities, and it was held by the Court of Appeal that they were liable only to replace the trust moneys with interest at 4 per cent.

Personal estate bequeathed in succession.

Personal estate bequeathed in trust for persons in succession is to be dealt with in such a manner as that it may be fairly and equally enjoyed by all of them, and not so as to give the tenant for life an advantage, to the detriment of those entitled in remainder. It is decided, that "where a temporary or failing fund is limited in successive estates, the first taker is not to have the annual proceeds of the property remaining *in specie*, but the property is to be converted and capitalized, so as to allow the first taker the annual income arising from such capital and to preserve the *corpus* to meet the subsequent claims under the settlement" (e). Where part of a testator's estate is found to consist of leases for terms of years, long annuities, or any other species of property, terminable and therefore depreciating in its nature, the first point to be ascertained is, whether any intention, express or implied, can be deduced from the will that the property shall be enjoyed *in specie* by the legatees. If such intention cannot be collected from the words of the will, it becomes the duty of the trustee to sell and convert all property of this description,

investments by trustees are stated : the case is most important to trustees.

(c) *Darey v. Croft*, Drury Rep. t. Napier, 403, 420 ; and see cases there cited.

and invest the proceeds in some fund approved by the Court, in order that it may be equally enjoyed by those to whom successive estates are given. The rule may be stated thus:—Where personal estate is given in trust for persons in succession, the Court holds that those persons are entitled to enjoy *the same thing*: and this they cannot do unless property of a perishable nature be converted into other property of a permanent nature, by means of an investment approved by the Court (*f*).

A specific bequest will of course amount to an expression of intention that the property shall *not* be converted (*g*), and a direction that a division of the property shall be made after the death of the tenant for life, has been considered equivalent to a direction that he is to enjoy it *in specie* (*h*). A direction that there shall be a sale *at a particular time*, has in like manner been held to indicate an intention that the property is to remain unaltered *until that time* (*i*).

Where property the subject-matter of a bequest given to persons in succession, is found by the trustees to be so laid out as to be secure and to produce a

When property is to remain *in specie*.

Practice where there can be no immediate conversion.

(*f*) *Howe v. Lord Dartmouth*, 7 Ves. 137; *Pickering v. Pickering*, 4 My. & C. 289; *Dimes v. Scott*, 4 Russ. 200; *Fitzgerald v. Fitzgerald*, 6 Ir. Ch. Rep. 145. The cases are collected in the notes to *Howe v. Dartmouth*, in 2 Le. Ca. Eq.

(*g*) *Lord v. Godfrey*, 4 Madd. 455; 2 Lead. Ca. Eq.; *Hood v. Clapham*, 19 Beav. 90.

(*h*) *Collins v. Collins*, 2 My. & K. 703.

(*i*) *Daniel v. Warren*, 2 Y. & C. 290; and see 2 Lead. Ca. Eq. 2nd ed. 280.

large annual income, but not to be capable of immediate conversion without considerable loss to the estate, then the rule is not to sell, but to set a value on the property and to allot to the tenant for life 4 per cent. on such value, and the residue of the income must be invested, and the income of the investment paid to the tenant for life, but the principal secured for the remaindermen (*k*).

The rule in
Howe v.
Dartmouth.

The Rule as to the conversion of personal estate bequeathed in succession, was considered by the Court of Appeal, in a case where a testator at the time of his death was possessed of a sum of *Navy* 5 per cent. annuities, a stock which after some changes became at last represented by $3\frac{1}{4}$ per cent. Bank annuities. The testator by his will directed a sale of his residuary estate, and an investment of the money arising therefrom in Government or other good security, to be held in trust by S. F., to whom also he gave the first life-interest. She received the dividends during her life, and took no step for the conversion of the *Navy* 5 per cents. After her death, when the fund had dwindled to $3\frac{1}{4}$ per cent. stock, it was sought to make her estate liable for such a sum of consols as would have been purchased with the money arising from a sale of the other securities, had such sale been effected; and Sir J. Romilly, M. R., on the authority of *Howe v. Dartmouth* (*l*), held that her estate was

(*k*) See *Caldecott v. Caldecott*, 1 Y. & C. C. C.; *Arnold v. Ennis*, 2 Ir. Ch. Rep. 601.

(*l*) 7 Ves. 137; 2 Lead. Ca. Eq. 225.

liable accordingly. The judgment was reversed on appeal, and *Howe v. Dartmouth* was commented upon. Sir G. Turner, L.J., remarked that where there is no trust for investment, the Court expects that executors will invest in consols. When there is a discretion as to investment, and the money is found invested in another manner, it is not a breach of trust to leave it there. "In this case there was no imputation of unfairness against the executrix, and she did no more than leave the fund in the state of investment in which she found it" (m). It will be observed that the trustee had here allowed the fund to remain outstanding on *Government* security, although not upon the particular fund sanctioned by the Court. There is abundant authority for concluding that neither the *bona fides* of the trustee, nor his adoption of modes of investment approved of by the testator, will secure him against the consequences of a breach of trust, when he leaves the fund outstanding upon neither real nor *Government* securities (n).

The rules laid down for the guidance of trustees, and adverted to in the preceding pages, will apply

Personal
property held
in trust for
an infant.

(m) *Baud v. Fardell*, 7 D. M. & G. 628; 25 Law J. (Ch.) 21.

(n) See pp. 115, 116, *ante*, and cases there referred to. In a recent case a supposed right of proceeding against a trustee for breach of trust was assigned for a nominal consideration to a person, whose suit was at once dismissed in a manner which affords no encouragement to speculative suits of a similar character. *Hill v. Boyle*, L. Rep. 4 Eq. 260.

with at least as much force to cases where the *cestui-que trust* is not of legal age. It may, perhaps, be stated, that the Court of Chancery (under whose protection infants are by law especially placed) is more than usually stringent in requiring the investment of funds to which they are entitled, in the Government securities approved by the Court. A trustee is not authorized in paying over any sum of money to the infant himself, for the latter is not capable of giving a valid receipt for it (*o*) ; nor can a trustee safely invest in the purchase of land, or in any other way than that prescribed by the rules of the Court, although such investment may appear to be more for the advantage of the infant. The proper course will be, under these circumstances, to apply under sect. 30 of stat. 22 & 23 Vict. c. 35, to a judge in equity for advice as to the course to be taken (*p*).

Maintenance
and advance-
ment.

The question frequently arises—how far trustees will be justified in applying the trust fund of a minor for his maintenance and advancement, where no such

(*o*) A release given to the trustee by a *cestuique trust* during infancy, is of course void ; after coming of age, a release given by the latter may protect the trustee, or the acts of the latter may be confirmed by the acquiescence of the former, but a mere omission to require repayment for several years will not deprive him of his right. *Dagley v. Telferry*, 1 P. W. 285 ; *Lee v. Brown*, 4 Ves. 362 ; *Overton v. Banister*, 3 Hare, 503 ; *Burrrows v. Walls*, 5 D. M. & G. 233.

(*p*) See Chapter IX. “ Judicial Advice.” See *Winchelsea v. Norcliffe*, 1 Vern. 434 ; see also *Chester v. Rolfe*, 4 D. M. & G. 798 ; *Re Barrington’s Settlement*, 1 Joh. & Hem. 142.

application of the fund has been authorized by the terms of the trust? In many instances the application of the *dividends* or *income* for these purposes has been sanctioned, but in very rare instances has this been sanctioned as to the principal (*q*). On the whole, a trustee cannot be advised to break in upon the principal for the maintenance of an infant, without a previous application to the Court, which will fix the amount, having regard to the position in life and the property of the infant.

Trustees are now empowered to apply the income of the property of infants for their maintenance. Sect. 26 of Lord Cranworth's Act (*r*) enacts, that in all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for the trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards his maintenance and education, the whole or any part of the income of the property, whether there be any other fund applicable to the same purpose or not.

Income may
be applied to
wards main-
tenance of
infant.

(*q*) *Walker v. Wetherell*, 6 Ves. 474; *Sisson v. Shaw*, 9 Ves. 285; *Cotham v. West*, 1 Beav. 381; *Ex parte Hays*, 3 De G. & Sm. 485; *Prince v. Hine*, 26 Beav. 636. The Court will not break in upon the capital for *maintenance*, unless the fund be small in amount, *Ex parte Green*, 1 J. & W. 253. For *advancement* this will be done with more readiness, *Ex parte M'Key*, 1 Ball & B. 405.

(*r*) 23 & 24 Vict. c. 145.

The residue of the income is to be accumulated and invested for the benefit of the person ultimately entitled ; but the trustees may apply such accumulations as if the same were part of the income arising in the then current year.

Duties of
trustee of
policy of in-
surance.

The first duty of a trustee of a settlement which comprises a policy of insurance, is to give notice to the office that the policy has been assigned, and to secure the custody of the policy (*r*) ; these precautions are for the purpose of preventing a possible sale, or surrender of the policy by the settlor. The trustee should then, if the insurance be "with profits," ascertain whether any bonus declared by the company is properly applicable in augmenting the amount ultimately payable ; this will be the case if the settlor has expressly covenanted to pay a certain fixed annual premium. In this case when the "bonus" is declared, the trustee should elect to take the bonus by *way of addition to the ultimate amount payable*, so as to prevent the assurer from applying it, as he otherwise might be inclined to do, in diminution of the annual premium. The trustee must in all cases see that the policy is kept alive by regular payment of the premiums ; and he must, if necessary, take steps to enforce their payment (*s*). If the assured

(*r*) Policies may now be assigned with great facility, under the Act of 1867, which will be found in the Appendix.

(*s*) *Marriott v. Kinnersley*, Taml. 470. It is the duty of a trustee to sue upon the covenant of a settlor who neglects to secure the trust property. *Macnamara v. Carey*, 1 Ir. Rep. Eq. 9.

be so circumstanced that he cannot pay the premiums, the trustee may, if he think fit, himself advance the requisite amount (*t*). The trustee may perhaps find himself burdened with a policy of assurance, and also with other trust funds which he is not clearly empowered to apply in keeping up the assurance. In such case he will usually be safe in applying any fund at his disposal, belonging to the same trust, towards payment of the premiums (*u*) ; but this would be a fitting question to submit for the advice of a judge in equity (*v*).

If no fund is forthcoming, or procurable, but not otherwise, the trustee will be justified in surrendering, or selling the policy (*w*). For any premiums advanced by him he will of course have a valid *lien* on the policy, and he may repay himself with interest at 4 per cent. whenever the insurance falls in (*x*).

When the period arrives for distribution of the trust fund, the chief care of the trustee will be to ascertain what persons are entitled to receive it, and can give valid receipts. He must take especial care to

Where there
is no fund to
pay premium.

Duties as to
distribution.

(*t*) *Clack v. Holland*, 19 Beav. 262, 273 ; *Hobday v. Peters*, 28 Beav. 603.

(*u*) See *Darcy v. Croft*, Drury Rep. t. Napier, 403.

(*v*) See Chapter IX. "Judicial advice."

(*w*) *Hill v. Trenery*, 23 Beav. 16 ; *Beresford v. Beresford*, 23 Beav. 292.

(*x*) *Clack v. Holland*, 19 Beav. 262. As to the validity of a claim of lien upon trust property set up by assignees of the trustee, see *Murray v. Pinkett*, 2 Ha. 120 ; on appeal, 12 Cl. & F. 764.

Notice of
dealings.

remember what notices have been given him, for after a notice of assignment he cannot safely make any payment to the assignor (*y*). The difficulties that he may have to contend with in the distribution of the fund may arise either from uncertainty as to the legal rights of the several claimants, or from obstacles in the way of payment to ascertained and rightful claimants.

Uncertainty
as to the
right
claimant.

When from any circumstances it is uncertain whose is the hand entitled to receive payment, the opinion of counsel will, of course, be taken, for the guidance of the trustee. If the latter be wrongly advised and make an improper payment, the fact of his having acted under the advice of counsel will not, however, protect him against the necessity of paying the amount over again to the person really entitled (*z*). Nor will this circumstance always preserve him from liability to costs. In a recent case on the construction of very special words in a will, the Lords Justices held that a certain person took a vested interest in a sum of money, which had some time previously been paid by the trustee to another person, under a misapprehension of the law, but fortified in his view of it by the opinions of two eminent equity counsel (one of them afterwards Vice-Chancellor). The trus-

(*y*) *Cresswell v. Denzell*, 4 Giff. 460. Notice to bind a trustee must be precise and explicit, and given by the right person. *In re Brown*, L. R. 5 Eq. 88, and cases there cited.

(*z*) *Doyle v. Blake*, 2 Scho. & Lef. 243; see *In re Knight's Trusts*, 27 Beav. 45.

tee was, nevertheless, decreed to pay the amount over again, *and to pay the costs (a)*.

Difficulties may arise, where the beneficial title to chattel property is in a married woman. A sum of money or *chattel* personal of the wife, of which payment or possession can be recovered without any suit or proceeding instituted in equity, in relation to it, will usually be receivable (in conformity with the rules of law) by the husband alone (*b*). But where the aid of the Court is sought for the recovery of the wife's property (*c*) the established rules of equity give her a title to a settlement of part of the fund on herself and her children, as against her husband and all persons claiming under him (*d*).

When the husband of a married woman entitled to a trust fund is bankrupt or insolvent, the trustee, before distribution, is under the necessity of making an agreement to divide the fund between her and the assignees, in accordance with a somewhat arbitrary but long settled rule of the Court which ensures a settlement on a feme covert of part of any fund, which is obtained through the aid of the Court. The ordinary rule is that one-half of such fund shall be settled

The wife's
equity to a
settlement.

(a) *Boulton v. Beard*, 3 D. M. & G. 608. See *Angier v. Stannard*, 3 M. & K. 566; *Devey v. Thornton*, 9 Ha. 232.

(b) Story, Eq. Jurisp. § 1402.

(c) Whether personal property or *chattels* real; *Sturgis v. Champneys*, 5 My. & C. 97.

(d) Story, Eq. Jurisp. § 1402 to 1421. All the cases are collected in the notes to *Murray v. Elibank*, 1 Le. Ca. Eq.

on the wife and her children (*e*) ; but, under special circumstances, this is subject to considerable variation. A fund under 200*l.* is usually paid over at once to the husband if he is able to maintain his wife ; but the Court exercises a discretion ; and when the husband is in insolvent circumstances and cannot maintain his wife, the whole fund is sometimes settled on the wife (*f*). But the usual course is to settle one moiety on the wife and her children, leaving the other moiety to be received by the husband or those claiming under him (*g*). The wife may appear before the Court in person and waive her right, but no consent of hers given in any other way can be acted on. Where a trustee has offered to deal with the fund of a married woman in the way in which the Court would deal with it, and that offer is rejected, his proper course is to lodge the fund in Court (*h*).

A difficulty has also, in some instances, arisen through the reduction into possession of the wife's reversionary *chose in action*, in consequence of the purchase by the husband of the prior life interest; but this can hardly arise again, as it has been finally decided that a surrender of the life interest made in order to enable the husband to reduce into possession, is invalid (*i*).

(*e*) *Spirrett v. Willows*, L. Rep. 1 Ch. App. 520.

(*f*) *Brett v. Greenwell*, 3 Y. & C. 230 ; *Re Merriman's Trust*, 10 W. R. 334 ; *In re Kincaid*, 1 Drew. 326.

(*g*) *Marshall v. Gibbings*, 4 Ir. Ch. Rep. 276.

(*h*) *Re Swan*, 2 Hem. & Mill. 34 ; see *Bagshaw v. Winter*, 5 De G. & Sm. 468.

(*i*) *Whittle v. Henning*, 2 Phil. 731.

The effects following on a divorce and the consequent orders of the Divorce Court have sometimes to be considered. A *chose in action* of the wife may, after a divorce, belong to her as fully and completely as though she had never been married (*k*). And, on the other hand, if the Divorce Court has made an order that the trust fund shall belong to the persons who would be entitled if the wife were dead, then the husband may be entitled (*l*). A trustee is expected to be acquainted with our laws ; but he is not expected to know those of Scotland (*m*), or of any foreign country. If he make a mistake and pay the wrong person, he will afterwards remain liable to the right person, but he will not ordinarily be charged with interest on the amount where there has been a *bonâ fide* mistake (*n*).

In distributing the trust fund, the trustee must be careful to make payments directly to the several *cestui-que trust*, or to persons lawfully authorized by them ; he should not pay money to an agent or solicitor, but in all cases to the principal (*o*). A payment made to the holder of a forged power of attorney, or to any other person *not* duly authorized, will of course be equivalent to no payment (*p*).

Payment to a
person not
lawfully
authorized.

(*k*) *Wells v. Malbon*, 31 Beav. 48.

(*l*) *Pratt v. Jenner*, L. Rep. 1 Ch. Appeals, 493.

(*m*) *Leslie v. Baillie*, 2 Y. & C. Ch. C. 91.

(*n*) *Saltmarsh v. Barrett*, 31 Beav. 349.

(*o*) Lord St. Leonards' Handy Book, 7th ed., p. 42.

(*p*) *Ashby v. Blackwell*, 2 Eden, 299 ; *Eaves v. Hickson*, 30 Beav. 136.

Payment
after revoca-
tion of power
of attorney.

The legislature has interfered to protect trustees and executors against a risk to which they were exposed when paying away trust money to the holder of a power of attorney, in ignorance of the fact that by the death of the party who had given it, or otherwise, the power of attorney had been revoked.

Sect. 26 of 22 & 23 Vict. c. 35, enacts that no trustee, executor, or administrator making any payment or doing any act *bonâ fide* under a power of attorney, shall be liable for the moneys so paid, or act so done, by reason that the person who gave the power of attorney was dead at the time of the payment, &c. or had revoked the power, provided that the fact of death, &c. was not known to the trustee or executor. But nothing is to affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made ; and the person so entitled shall have the same remedy against the recipient of the money as he would have had against the trustee or executor if the money had not been paid away under such power of attorney.

Where difficulties stand in the way of a distribution of the trust fund, arising from any of the above-mentioned circumstances, and indeed whenever a *reasonable doubt* exists as to the proper destination of the fund, the better course for the trustee will be to take advantage of the TRUSTEE RELIEF ACTS, and, by lodging the fund in Court, so secure himself against all the risks attending a distribution on a wrong principle (q).

(q) See Chapter VI.

It was held by Lord Eldon, in the leading case of *Brice v. Stokes*, and the principle has frequently been acted on in subsequent cases, that the person beneficially interested, who has acquiesced in a breach of trust, cannot afterwards proceed against the trustee in respect of it. The latter may be exonerated, not only by the concurrence of the *cestuique trust* in the particular act constituting the breach of trust, but also by his subsequent approval or adoption of it, express or implied (*r*). Persons under legal disability, as *femes coverts* or infants, are not capable of thus exonerating the trustee by acquiescence (*s*) ; although if they have *fraudulently* induced the trustee to commit a breach of trust, they cannot afterwards call him to account for it (*t*). A *feme covert* may, however, be bound by her acquiescence in a breach of trust committed in respect of her separate estate, such concurrence having been fairly obtained (*u*). But she will not be so bound with regard to property which she is expressly restrained from anticipating (*x*). The contemporaneous

(*r*) *Brice v. Stokes*, 11 Ves. 319 ; *Langford v. Gascoigne*, 11 Ves. 333 ; *Kellaway v. Johnson*, 5 Beav. 319 ; *Broadhurst v. Balguy*, 1 Y. & Coll. 16. The acquiescence need not be evidenced by writing, *Brewer v. Swirles*, 2 Sm. & Giff. 219 ; 2 Eq. Rep. 493.

(*s*) *Cocker v. Quayle*, 1 Russ. & M. 535 ; *Cresswell v. Dewell*, 4 Giff. 460.

(*t*) *Evans v. Bicknell*, 6 Ves. 181 ; *Davies v. Hodgson*, 25 Beav. 187.

(*u*) *Pemberton v. M^o Gill*, 8 W. R. 290 ; *Brewer v. Swirles*, 2 Sm. & Giff. 219 ; *Jones v. Higgins*, L. R. 2 Eq. 538.

(*x*) *Clive v. Carew*, 1 Joh. & Hem. 199 ; *Rowley v. Unwin*,

Acquiescence
in breach of
trust.

consent or the subsequent approval of the *cestuique trust* will not affect his remedy, if he be in ignorance of the facts, or under misapprehension as to the legal effect of the transaction (*y*).

Remedy
against the
interest of
cestuique trust.

It usually happens that an improper investment is made through the solicitations of a person having only a life estate, or limited interest in the trust fund. To the extent of the interest of such person, the trustee has the right of being indemnified against the consequences of his breach of trust; and this partial relief has been granted even where the *particular security* does not appear to have been selected or approved of by the tenant for life, although to his solicitations the change of investment was doubtless to be attributed (*z*).

2 Kay & Joh. 138; *Fletcher v. Green*, 33 Beav. 426. It seems doubtful whether the separate estate of a feme covert will be affected by her verbal promise; also whether a breach of trust committed with regard to one fund can be visited on her separate estate in a wholly distinct fund. See 2 Drew. 183; 4 Drew. 673; 4 Ir. Ch. Rep. 274; 10 Ir. Ch. Rep. 467. "The doctrine of separate use is in transition, and is not clearly established in all its points." V.-C. Kindersley in *Wright v. Chard*, 4 Drew. 685; see also 12 Jur. N. S. 984; Lewin on Trusts, 5th ed. 536—553. The liabilities of a married woman in respect of her separate property were lately considered in *Re Leeds Banking Company, Matthewman's Case*, L. Rep. 3 Eq. 781; see also *Mara v. Manning*, 2 Jo. & Lat. 311; *Davis v. Hodgson*, 25 Beav. 186; *Jones v. Higgins*, L. Rep. 2 Eq. 538.

(*y*) *Buckeridge v. Glasse*, 1 Cr. & Ph. 135.

(*z*) *Booth v. Booth*, 1 Beav. 125; *Raby v. Ridehalgh*, 7 D. M. & G. 104; 24 L. J. Ch. 528; *Hood v. Clapham*, 19 Beav. 90; and see cases cited Drury Rep. t. Napier, p. 595—603.

What conduct on the part of the *cestuique trust* will amount to acquiescence in a breach of trust, will depend on the circumstances of each case, and cannot be defined by any general rule. It seems that receipt of the augmented income, arising from an improper investment, will not of itself prejudice the rights of the *cestuique trust*. Lord Cranworth, C., refused to hold a tenant for life liable to repayment of such excess of income, on the ground that she had not been a willing party to any overpayment, and that the hardship would be great were she compelled, after the lapse of many years, to refund sums voluntarily paid to her by the trustees (a). Where the irregular investment has taken place at the instance of a *cestuique trust*, who has in consequence of it received a larger income, he may be ordered to refund the difference between the interest that would have been payable on a proper investment, and the interest actually received (b).

The converse case arose in *Hamilton v. Hamilton* (c), where a trust fund had been invested in Government stock, which ought, according to the terms of the trust, to have been invested in some security yielding a higher rate of interest. Here it was held that there was no equity against the representatives of the trustee for the difference between the income actually realized, and that which ought to have been realized, inasmuch

What conduct amounts to acquiescence.

(a) *Bate v. Hooper*, 5 D. M. & G. 338.

(b) *Baynard v. Woolley*, 20 Beav. 583.

(c) Drury, temp. Napier, 217 ; and see *Stafford v. Stafford*, 1 De G. & Jo. 193 ; and other cases there cited.

as the person having a life interest on the fund knew or might have known all the facts, and acquiesced in the investment complained of.

What conduct amounts to acquiescence?

The question, what conduct amounts to acquiescence? was considered in the case of *Burrows v. Walls* (*d*). In that case three trustees appointed by a will accepted the trust, but one of them alone acted in it, and the others did not interfere. The trust fund was divisible among the three children of the testator, on the coming of age of the youngest of them. When that event happened, the youngest child, on behalf of himself and the others, made numerous applications to N., the "acting trustee," for a settlement; and, in reply to a proposition from him, agreed to give him time for payment by instalments. On a suit being instituted against all three, W. and C., the passive trustees, repudiated any liability; it was argued on their behalf, that having given time to N., the plaintiffs had acquiesced in his sole dealing with the fund, and had exonerated his co-trustees. On appeal, Lord Cranworth, C., held otherwise. His lordship said: "The mere fact of not having called in the money from the acting trustee does not appear to be a circumstance that disentitles any of the plaintiffs to insist now on the liability of the other trustees; because, although it is perfectly clear on all the authorities and all principle that no *cestuique trust* can allege that to be a breach of trust, which has been done under his own sanction—for that is the meaning

(d) 5 D. M. & G. 233; 3 Eq. Rep. 960.

of acquiescence—either *previous sanction* or *subsequent ratification*, as was said by Lord Eldon in *Walker v. Symonds* (e). *When you speak of acquiescence you must look at all the circumstances of the acquiescence.* . . . In order to be favourable to the trustee who alleges acquiescence, it must be a consent on the part of the persons who have a right to call the trustees to account that they shall be absolved from liability ; and that they will adopt the misapplication of the funds as having been done with their assent and sanction. . . . It was the duty of the trustees, W., C., and N., not only to have had the money in their hands, but not having it in their hands, to have explained to the infants as they came of age, what the rights of those infants were. . . . They were not lawyers ; even if they were, very likely they would not know the fact that the other trustees were responsible to them ; and I think neither in the form of acquiescence, nor in the form of giving time, can these young men be deprived of their rights, or of asserting them against the trustees, and that the circumstance of this money having been placed in the hands of N. did not exonerate those in whose hand sit was not, but in whose hands it ought to have been, and that they are responsible. . . . The decree will be that the defendants W. and C. are, as between themselves and the plaintiffs, responsible, and they must be made to pay the money, together with all the costs occasioned by

All the circumstances
must be
looked at.

(e) *Walker v. Symonds*, 3 Swanst. 64.

their having repudiated such liability and of the consequent investigation" (*f*).

The course usually adopted by a trustee who has been persuaded into making an irregular investment, or otherwise acting so as to render himself liable for breach of trust, is to obtain a formal release from as many of his *cestuisque trust* as can be induced to join in it, or a deed of confirmation by them. No such instrument will avail for the protection of the trustee except so far as it be executed by persons of full age, *sui juris*, and legally capable of binding themselves, acquainted with the material facts of the case, and also fully aware of their strict equitable rights. If any of the foregoing requisites be wanting, the transaction is liable to be scrutinized, and the strict rights of the *cestuisque trust* enforced, even after the lapse of many years; notwithstanding a prior settlement of the trust accounts, and execution of a deed of release to the trustee (*g*).

It has been already stated that where an express trust is subsisting, no lapse of time will operate as a

(*f*) 5 D. M. & G. 233; see also *Re Saxon Assurance Society*, 2 John. & Hem. 412; *Strange v. Fooks*, 4 Giff. 408.

(*g*) *Walker v. Symonds*, 3 Swanst. 1; *Wedderburn v. Wedderburn*, 4 My. & C. 41, 50; *Aspland v. Watte*, 25 L. J. 53 (M. R.) In the last case payment had been made to the *cestuisque trust*, and they had released in 1843; the circumstances being, however, peculiar, and the plaintiffs, at the time of the release, ignorant of their rights, they obtained a decree against the trustee in 1855.

Release of
breach of
trust,

—requisites
of.

What lapse
of time will
bar the
cestuisque
trust.

bar to the remedy of the *cestuique trust*; while in cases of trusts arising by operation or construction of law, the Court of Chancery will be guided by the analogy afforded by the statutes of limitation affecting legal demands (*h*).

No specific rule has been laid down, and no course of practice adhered to, with regard to the length of time that will be sufficient to deprive the *cestuique trust* of his right to re-open the accounts and show that *acquiescence in*, or *confirmation of*, a breach of trust has not been such as to bind him. It is frequently difficult to determine at what period the *cestuique trust* first became fully aware of his rights, for it is not until after that period that he is open to the charge of negligence in enforcing them (*i*).

All the cases bearing upon this subject have been decided with regard to their special circumstances, and the Courts of Equity have carefully abstained from fixing any number of years, the lapse of which shall suffice to deprive *cestuisque trust* in general of their equitable rights. No trustee can confidently rely on a past settlement of accounts, or can be sure that his representatives after his death will not be made defendants in a suit for the purpose of re-opening those accounts. He will, however, be approximately secure if he refuse to vary from the terms of the trust, or deviate from the

No rule laid
down by the
Court.

(*h*) See page 92, *ante*.

(*i*) *Randall v. Errington*, 10 Ves. 423; *Adams v. Clifton*, 1 Russ. 297; *Wedderburn v. Wedderburn*, 4 My. & C. 41.

course marked out in relation to it by the rules of equity, without the safeguard of a deed of release and indemnity, reciting the circumstances, and executed by all persons interested, who should be represented by a separate legal adviser.

A trustee retiring from the trust, or finally settling accounts with the *cestuisque trust*, frequently requires from them a release or discharge in writing, from all claims and demands. To a formal release under seal he is not, in strictness, entitled, when he has performed the trust in all particulars, according to the tenor of the instrument creating it; the *right* of the trustee to a release is confined to those cases where he has incurred liability by departing from the trusts (*k*).

Although it has been decided that a trustee cannot insist on obtaining a release as a condition of his distributing or transferring the trust fund, it seems reasonable that on parting with it he should obtain a written discharge; and it is apprehended that he would be justified in having one prepared at the expense of the trust fund, and tendered for execution.

Where all the *cestuisque trust* are of full age, and capable of executing, a release should by all means be obtained; and more particularly where there has been any deviation from the strict line of duty on the part of the trustee. A release will not be disregarded or

(*k*) *King v. Mullins*, 1 Drew. 308; and see *Fulton v. Gilmour*, cited Hill on Trusts, 605; *Re Wright's Trust*, 3 Kay & J. 421; *Re Cater's Trust*, 25 Beav. 366.

set aside by a Court of Equity without ample consideration, and substantial grounds. The *onus* lies on all who have joined in it to show that it is not conclusive evidence of a valid settlement of accounts ; and the difficulty of their so doing will, of course, be increased as time is allowed to elapse, without any effectual steps being taken by them to set it aside.

Where, on the other hand, some of the *cestuisque trust* are under age, or otherwise incompetent to bind their rights by the execution of a deed, the trustee must, on no account, vary from the strict course marked out by the rules of equity, however beneficial to all parties it may appear to do so. If the trustee is anxious to free himself from the anxieties caused by the trust fund, he may take advantage of the Trustee Relief Acts where those Acts apply, and where they do not apply he can only exonerate himself by instituting a suit, and thus committing the administration of the trust to the Court of Chancery. A decree discharging the trustee, duly made in a suit to which all persons beneficially interested are made parties, will protect him against all further claims of every kind. These are the *only safe* modes of relinquishing the burden of the trust, after it has been undertaken, and before it is fully executed (*l*).

When the whole beneficial interest in the trust fund is vested in the *cestuique trust*, and there is no duty remaining unperformed, nor anything in the terms of

The only *absolutely safe*
discharge is
under the
Court.

(*l*) *Lowe v. Carter*, 1 Beav. 426 ; Story, Eq. Jur. § 1276, n.

Jus disponendi.

Equitable title not made out.

the trust to prevent an union of the legal and equitable interest, the *jus disponendi* may be exercised by the beneficial owner; and an assignment or transfer must be made by the trustee either to him, or to such person as he may direct. If, however, the equitable title is not clearly made out to the satisfaction of his legal advisers, the trustee may be justified in refusing to assign: and in a case of difficulty and complication he may safely decline to act without the direction of the Court.

Liability as an executor ceases after statutory notices.

A trustee who is also executor will, if well advised, before distributing the assets of the testator, issue public notices pursuant to 22 & 23 Vict. c. 35, after which he will have the same protection as though he had administered the fund under a decree of the Court; and if, on making such distribution, he retains legacies in his hands as *trustee*, after appropriating or setting them apart for the benefit of the *cestuisque trust*, he will no longer be under any liability in his capacity of executor (*m*).

Notice of incumbrance.

An assignee of, or incumbrancer upon, the beneficial interest, may, by giving the trustee notice of his claim, secure his own priority, and effectually prevent the latter from making a payment or assigning to the *cestuisque trust*; he will thus fix the trustee with a personal liability, in the event of his afterwards assigning to the *cestuisque trust*, or to any subsequent claimant

(*m*) *Clegg v. Rowland*, L. Rep. 3 Eq. 368.

under him (*n*). The trustee should therefore, before distributing the trust fund, recollect whether any and what notices have been given to him by assignees of, or claimants upon, any of the shares. It has just been decided that a trustee is bound only by a *formal and regular notice given to him by the right person*, and not by rumours, or the statements of third parties, or even by public announcements of facts which might influence the legal rights of the persons interested (*o*).

The trustee is not allowed to set up a title adverse to that of his *cestuique trust* (*p*) ; and where there is

Validity of
the trust to
be assumed
by trustee.

(*n*) *Dearle v. Hall*, 3 Russ. 1 ; *Loveridge v. Cooper*, 3 Russ. 30 ; *Hodgson v. Hodgson*, 2 Keen, 704 ; *Bridge v. Beadon*, 3 L. Rep. Eq. 664 ; *Lloyd v. Banks*, L. Rep. 4 Eq. 222. It seems from this case that the title of a purchaser, who has given notice to the trustee, will prevail against that of assignees in insolvency, who have not given notice. (See *Rc Combe's Will*, 1 Giff. 91 ; and stat. 12 & 13 Vict. c. 106, s. 141.) A purchaser of an equitable interest in a chose in action should immediately give notice of the assignment to the trustee ; and the latter will then be bound by such notice. No priority is however gained by giving notice *before* the trustee becomes such in fact, *Buller v. Plunkett*, 1 Joh. & Hem. 441. If inquiries be made of the trustee as to the equitable title by an intending purchaser, the trustee must be careful as to his replies ; for a person purchasing in reliance on information so given may have a remedy over against the trustee, if misled. *Brown v. Savage*, 5 Jur. N. S. 1020 ; *Slim v. Croucher*, 1 D. F. & J. 518.

(*o*) *Lloyd v. Banks* (M. R.), L. Rep. 4 Eq. 222 ; *In re Brown*, L. Rep. 5 Eq. 88 ; and cases there cited.

(*p*) *Langley v. Fisher*, 9 Beav. 60 ; *Newsome v. Flowers*, 30 Beav. 461.

* Revised 1868 & 16

only ground for suspicion, but no certainty, that the trust deed is impeachable and it has not been successfully impeached, the trustee will be safe in assuming its validity (*q*).

Claim ad-
verse to the
trust.

In the event of a claim being adverse to the title under which the trustee holds, and of which he was in ignorance at the time of his accepting the trust, he is justified in applying to the Court to be relieved of it (*r*). Whether he would be justified in doing so if he had notice of the adverse claim when first appointed trustee, appears to be less certain. This question arose in the case of *Neale v. Davis* (*s*), where it was admitted that the trustees had notice, when they accepted the trust, of the existence of an adverse claim. On a bill being filed by the *cestuisque trust* for transfer of their shares of the fund, Wood, V.-C., held, that the transfer could not be ordered except in a suit so constituted as to parties that the validity of the settlement could be decided. On appeal, Turner, L. J., concurred, observing that the knowledge of the adverse claim at the time of accepting the trust would not diminish the right of the trustee to come to the Court for direction: *A trustee could not pay away a fund while it was claimed by other persons under an adverse title*: Where all the persons interested were adult the trustee might protect himself; but this was not a case

(*q*) *Beddoes v. Pugh*, 26 Beav. 407.

(*r*) *Neale v. Davis*, 5 D. M. & G. 258.

(*s*) 5 D. M. & G. 258; 3 Eq. Rep. 530.

for an indemnity, for infants were interested. Knight Bruce, L. J., however, dissented, and expressed a strong opinion that, having accepted the trust with a full knowledge of its circumstances, the trustees were bound to fulfil it. The Court being equally divided, the decision of the Vice-Chancellor stood.

CHAPTER VI.

OF PROCEEDINGS UNDER THE ACT FOR THE RELIEF OF
TRUSTEES.

The Trustee
Relief Act.

DIFFICULTIES arising from uncertainty as to the identity, or the legal rights, of *cestuisque trust*, or from disabilities under which they may labour, or from conflicting claims of creditors of the *cestuisque trust*, frequently render it unsafe for the trustee to take the distribution of the fund into his own hands. The only course formerly open to him was the institution of a suit in Chancery for the administration of the trust; and the natural anxiety of trustees to avoid the expense and delay consequent on this course frequently induced them to undergo the risks attending an erroneous distribution, rather than adopt a course which not only involved them to some extent in litigation, but also inflicted no inconsiderable expense on the *cestuisque trust*.

Advantage of
these acts to
the trustee.

A trustee who is in doubt as to the proper mode of applying the fund, or is, from any cause, desirous of relieving himself from the burden of the trust, may now avail himself of the important facilities afforded by the TRUSTEE RELIEF ACT (*a*). If, for example, his *ces-*

(*a*) 10 & 11 Vict. c. 96 ; amended by stat. 12 & 13 Vict. c.

tuique trust declines to pass his accounts and give him (when he is entitled to receive it) a discharge from the trust, his best course will be to lodge the fund in Court under these Acts (*b*). Or when a person is appointed to act as his co-trustee in whom he has no confidence (*c*); or where the fund is the separate property of a married woman who has an equity to a settlement therein (*d*). By lodging the fund in the Court of Chancery in the manner prescribed by these Acts he will be relieved from all further inconvenience, and will obtain complete indemnity against the dangers attending a wrong application of it. By a simple mode of procedure, and at a small expense, the administration of the trust can thus be thrown upon the Court. The advantages afforded by this Act are not less important to *cestuisque trust*, who are now enabled by petition in a summary manner to have their rights declared, and the funds distributed accordingly.

The “Act for the better securing Trust Funds and for the Relief of Trustees” (10 & 11 Vict. c. 96), provides that all trustees, or other persons having in their hands any moneys belonging to any trust whatsoever, shall be at liberty, on filing an affidavit, shortly describing the instrument creating the trust, according

T. R. Act,
1847.
Lodgment of
trust fund in
Court.

74. The corresponding Act for Ireland is 11 & 12 Vict. c. 68. These Acts will be found in the Appendix to this volume. They are usually styled the “Trustee Relief Acts,” although no short titles are given in the Acts themselves.

(*b*) *In re Wright*, 3 Kay & J. 419.

(*c*) *In re Williams*, 6 W. R. 218.

(*d*) *Re Swan*, 2 Hem. & Mill. 34.

to the best of their knowledge and belief, to pay the same into the Bank to the credit of the Accountant-General of the Court of Chancery (with his privity) in the matter of the particular trusts, describing them as accurately as possible, in trust to attend the orders of the Court. And it is further provided that annuities or stocks in any Government or Parliamentary securities, or of the East India or South Sea Companies (*e*), may also be transferred to the Court in the same manner; and that the receipt of the Bank cashier, or of the proper officer, shall be a sufficient discharge to the trustees for the money or securities so lodged or transferred (*f*).

T. R. Act,
1849.
Lodgment by
majority of
trustees.

The "Act for the further Relief of Trustees" (12 & 13 Vict. c. 74) was passed merely to supply an omission in the above Act. It provides, that if on any petition presented in the matter of that Act, it shall appear to the Judge of the Court of Chancery before whom the petition shall be heard, that any moneys, annuities, &c., are vested in any persons as trustees, &c., and that *the major part* of such persons are desirous of lodging them in Court, but that for any

(*e*) The Act affords no relief to trustees of shares in any other public company, or to holders in trust of the securities of any foreign Government (18 Jur. 442). Stock in the books of any Canal Company in Ireland may be lodged under the corresponding Irish Act, 11 & 12 Vict. c. 68 (sect. 1).

(*f*) Money or stock in the hands of a trustee, for a charitable purpose, may be lodged with the official trustee of the Charity Commissioners 18 & 19 Vict. c. 124, s. 22. See Chapter VIII., *post*.

reason the concurrence of the other or others of them cannot be had, the Court may order the lodgment to be made by the major part of them without the concurrence of the other or others ; and every lodgment so made is to be as valid and effectual as if it had been made on the authority or by the act of *all* the persons entitled to such moneys, annuities, &c. (g).

The mode of obtaining relief provided by these Acts is optional with, and not imperative upon, the trustee (h) : he is still at liberty to proceed by suit or otherwise, as though the Act had not passed. He would doubtless, however, subject himself to the costs of a suit instituted by him, where the mode of proceeding pointed out by the Act would have answered every useful purpose. The Act is so framed as to allow the trustee not only an option of instituting a suit where the Act would apply, but also an option of lodging the fund in Court under the Acts, where there is no difficulty whatever in the way of paying it over to the *ces-tuique trust*. Every trustee holding trust money, or securities of the description specified in the Act, is entitled to take advantage of the Act, although such proceeding may be, on his own showing, unnecessary and even vexatious (i).

Option allowed to trustees of proceeding under these Acts.

(g) The corresponding Irish Act, 11 & 12 Vict. c. 68, which will be found in the Appendix, contains the substance of both the English Acts ; as sect. 2 of the former provides for the case contemplated by the Act of 1849, viz., where the concurrence of all the trustees cannot be procured.

(h) See *Handley v. Davies*, 5 Jur. N. S. 190.

(i) *Mitchell v. Cobb*, 17 L. T. 25 ; *Re Waring*, 16 Jur. 652 ;

Applicable
only to
funds held
on express
trusts.

The Court will not put a wide construction on the words of the Act describing the parties who may avail themselves of its provisions. A trustee who is constituted such by express declaration is in all cases at liberty to lodge money and securities in Court; this course is not, however, open to all persons who may be liable to the payment of money. Thus, where a purchaser of real estate subject to legacies, raised the amount and lodged it in Court, and sought to establish a constructive trusteeship for the benefit of the legatee, Sir J. Romilly, M. R., ordered that the money should be paid out to the person who lodged it; observing that the Act was passed for the benefit of persons holding a fund affected by a trust created either by the original instrument, or by operation of law, and unable to ascertain to whom it is legally payable, and not for the benefit of owners of land subject to charges; and that if it were held otherwise, the party entitled to the legacy would have to bear the costs of obtaining payment, instead of receiving the amount clear from the costs of raising it, as they were entitled to do (*k*).

Legacies
may be paid
into Court:
costs of
legatees.

The Court has, on some occasions (*l*), intimated that it was not the object of the Act to throw upon legatees costs and expenses which are properly payable out of

Re Covington, 26 L. J. Ch. 238. The Court will however check unnecessary lodgments under this Act, by making the trustee pay costs, *In re Knight*, 27 Beav. 45; *In re Woodburne*, 1 De G. & J. 333; *In re Foligno*, 32 Beav. 131.

(*k*) *In re Buckley*, 17 Beav. 112. It seems from the latest cases, that any person holding *trust-money* may lodge it under the Act, *In re Webb*, L. R. 2 Eq. 456.

(*l*) *In re Buckley*; *In re Sharpe*, 15 Sim. 472.

the testator's residuary estate ; and so place upon them a burden to which they were not subject before the passing of the Act. If this be the case, it is apprehended that the Act has not been so framed in this particular as to carry into effect the intentions of the legislature. It is undoubtedly competent for an executor or administrator to pay the amount of a legacy into Court under this Act, and the legatee will probably be burdened with the costs and expenses attending the application for payment (*m*). Although an owner of land cannot himself pay in the amount of a legacy, he may accomplish that object through the instrumentality of the testator's executor or administrator (*n*). The purchaser above referred to would, in all probability, have attained his object, if, instead of lodging the amount of the legacies in Court in his own name, he had made efforts to discover the personal representatives of the testator, and the lodgment had been made by them.

Advantage may be taken of the facilities afforded by this Act, on the occasion of a sale of real estate by trustees under a power of sale, who have no power of giving valid discharges for purchase money. In such cases a purchaser is frequently bound to see to the application of the purchase money ; and it may be incon-

Purchase
money may
be paid in,
where trust-
ees for sale
cannot give
discharges.

(*m*) Where an executor pays a legacy into Court, under this Act, his costs of paying it in are to be borne by the estate ; but those of paying it out by the legatee. *In re Canthorne*, 12 Beav. 56.

(*n*) *In re Mussenden*, 4 Ir. Jur. 389. Blackburne, L. C. (overruling the M. R.)

venient, if not impossible, to obtain the receipt of the *cestuique trusts*: By lodging the purchase money in Court under this Act, the difficulty may, however, be obviated. In a case where the construction of a power of sale came in question, Sir W. P. Wood, V.-C., said, "In the absence of a power to give a valid discharge for the purchase money, all difficulties of that kind might, I conceive, be removed by resorting to the provisions of the Act for better securing Trust Funds and for Relief of Trustees (stat. 10 & 11 Vict. c. 96), which seems precisely to meet such a case as the present. It appears to me that if, upon a sale of this property, the purchase money were paid into Court, pursuant to the provisions of the Act, the defendant would be able to make a good title, and the purchaser might safely complete his purchase" (o).

Mode of procedure.

Affidavit.

How to be entitled.

The mode of proceeding pointed out by the Act is very simple. The trustee who determines to lodge a trust fund in Court must file an **AFFIDAVIT**, entitled in the matter of the Act, and also in the matter of the particular trust ; and the title must be sufficiently minute in description to distinguish it from other trusts that can arise from the will or settlement originating it. Thus it is not sufficient to entitle the affidavit "In the matter of the trusts of the will of A. B.," or, "In the matter of the trusts of the settlement of C. D. and E. F." It should be further distinguished as "To the separate credit of the legacy of C. H." or

(o) *Cox v. Cox*, 1 Kay & J. 254.

“— the share of J. K.,” or as the case may be. The heading of the account (in the Accountant-General’s Books), to be opened as hereafter stated, will correspond with the title of the affidavit. Where the account is opened with too general a title, the Court has in some instances refused to deal with the fund until transferred to a more particular account (*p*). Such a transfer may, under some circumstances, require a distinct application to the Court by the trustee, at his own expense ; however, when the trustee has appeared on the hearing of a petition to draw out the fund, and all the facts have been admitted, a transfer of the fund to a separate account has been ordered, without any substantive motion for that purpose (*q*).

The affidavit to be made by the trustee is the only declaration of trust on which the Court acts ; it must, therefore, state all the facts necessary to enable the Court to deal with the fund. The General Orders (*r*) require the following particulars to be stated in every affidavit under this Act :—

The name and address of the trustee, and the place where he is to be served with any petition, or notice of any proceeding, or order of the Court, relating to the trust fund.

(*p*) *In re Joseph*, 11 Beav. 625 ; *In re Everett*, 12 Beav. 485 ; *In re Godfrey*, 2 Ir. Ch. Rep. 112. For headings of accounts see *In re Jervoise*, 12 Beav. 209. As to the mode of preparing the affidavit, see also 16 Jur. 652 ; 1 Jur. N. S. 974.

(*q*) *In re Wright*, 15 Beav. 367 ; *vide In re Levett*, 5 De G. & S. 619.

(*r*) XLI. Consol. Order. *See Appendix.*

Form of
affidavit.
Orders of
1848.

The amount of stock, securities, or money which he proposes to deposit or to transfer, or to pay into Court, to the credit of the trust.

A short description of the trust, and of the instrument creating it, and the names of the parties interested in or entitled to the fund, to the best of the knowledge and belief of the trustee.

The submission of the trustee to answer all such inquiries relating to the application of the stock, securities, or money transferred, &c., under the Act, as the Court may think proper to make or direct (s).

Statements
in affidavit
of trustee.

In addition to the foregoing particulars, the affidavit should state any special circumstances which have arisen to throw difficulties in the way of administering the trust; it should not, however, go into details further than may be necessary to explain the facts of the case. When the sum to be paid in is a balance admitted by the trustee as due by him, the whole particulars of the account need not be stated; the general result arrived at will be sufficient (t).

Lodgment of
fund.

The affidavit must be sworn and filed in the usual manner, and an office copy of it produced in the office

(s) The Gen. Order of the Court of Ch. in Ireland (Oct. 1848) also requires the above particulars to be stated in the affidavit of the trustee. Where the amount of a legacy is paid in, the Irish Act (sect. 6) requires, in addition, a statement in the affidavit to the effect that all legacy duty (if any be payable thereon) has been duly paid. This is not affected by the Orders of Michaelmas T. 1867.

(t) *In re Courtois*, 10 Ha. App. 64; *In re Waring*, 16 Jur. 653.

of the Accountant-General. The necessary directions will then be given by him for transfer, deposit, or payment of the stock, securities, or money, respectively, to the account of the particular trust ; and such transfer, deposit, or payment will be certified in the usual way (*u*).

If the affidavit made by the trustee, on lodging the fund in court, contain no statement to the effect that it is deemed unnecessary to have the fund or the dividends invested, the Accountant-General is at liberty to invest, as soon as conveniently may be, the cash paid into court in Bank 3 per cents. (*consols*) in the matter of the particular trusts. In cases of dividends or interest arising from stock or securities transferred, such dividends or interest, and all accumulations of the dividends of the stock in which such cash shall be invested, and of stock or securities, &c., may be from time to time invested in like manner, without any special order of the court, and without any formal request for that purpose. If, however, at any time a request in writing by any claimant on the fund, that such investment should be discontinued, be left at the office of the Accountant-General, he is at liberty to

Investment
of trust
moneys by
Accountant-
General.

(*u*) XLI. Consol. Order. See Appendix. No order is necessary to enable a trustee to lodge trust funds in court under this Act. *In re Biggs*, 11 Beav. 27. The practice in Ireland differs in this particular : an attested copy of the affidavit must be produced in the Registrar's office, where a side-bar rule will be entered, authorizing the lodgment of the fund in the Bank of Ireland, to the credit of the particular trust. The affidavit and side-bar order are then produced to the Accountant-General. 2 & 3 Gen. Order, 1848.

cease making any further investment, until some order of the Court be made in that behalf (*x*).

Notice of lodgment in Court.

After the lodgment of the fund in Court has been completed, it becomes the duty of the trustee to give notice of it to all the persons named in his affidavit, as interested in, or entitled to the fund (*y*). It is important for his security, not only that the affidavit should mention them, but also that they should have notice of the lodgment; for were the fund paid out without the knowledge of a party entitled, his rights as against the trustee might not be prejudiced by the proceeding under this Act. Where all the directions of the Act have been duly complied with, the burden of administering the fund is transferred from the trustee to the Court. To the extent of the money or securities lodged by him, the trustee is completely exonerated from the trust (*z*). It is competent for a trustee to

(*x*) Consol. Order. Investment of the trust fund in new 3 per cent stock has been allowed by the Court. *In re Dunster*, 3 Eq. R. 449. The corresponding order of the Court in Ireland [Ord. Ch. Feb. 1853] directs the investment in $3\frac{1}{4}$ per cent. stock now new 3 per cents. But by the General Orders of 1861 under the new Act, funds under the control of the Court may be invested in bank stock and certain other securities. See page 123, *ante*.

(*y*) Consol. Order. By leave of the Court any particular service may be dispensed with (*Re Hansford*, 7 W. R. 199), or substituted (*Re Colson*, 2 W. R. 111). *

(*z*) *In re Upfull*, 3 Mac. & G. 286; *Goode v. West*, 9 H. 378. A trustee who, by making an improper investment, has altered the character of the fund, will not, however, be discharged by lodging the unauthorized securities in Court under this Act. *Att.-Gen. v. Alford*, 18 Jur. 592. A lodgment in Court does not affect any further liability of the trustee. See *Thorp v. Thorp*, 1 Kay & J. 438.

Effect of lodgment.

lodge a part only of the sum actually payable by him ; nor have his *cestuisque trust* any mode of recovering the balance, unless they proceed under the ordinary jurisdiction of the Court. In the same way a trustee may deduct a sum for his costs and expenses ; and if he deduct more than the proper amount, the parties entitled to the fund have no remedy without instituting a suit against him (*a*).

The fund being lodged in Court in the manner prescribed by the Act, the Court is empowered to make such orders for transfer or payment, and for the administration of the fund generally, as it may think fit. Such orders are to be made upon PETITION, to be presented in a summary way (*b*) : and all orders are to have the same authority and effect as if made in a suit regularly instituted (*c*). All petitions presented, and affidavits filed, are to be properly entitled in the matter of the Act, and of the particular trust. The trustee is entitled to notice of any application made to the Court respecting the fund ; and he is required to give notice of any application by him, to the parties interested in or entitled to the fund (*d*).

Neither the Act itself, nor the General Orders made in pursuance of it, prescribe what other persons are to have notice of applications for payment. In accord-

Administration
of the
fund, on
petition.

Service of
petition.

(*a*) *In re Bloye*, 1 Mac. & G. 480 ; 2 Hall & T. 140.

(*b*) The Court will not pay out the fund on motion, a petition is indispensable, *Exp. Stock*, 5 Ir. Jur. 341.

(*c*) T. Relief Act, sect. 2. As to the persons who ought to be served, see 6 W. R. 487 ; 9 W. R. 475 ; 9 W. R. 830.

(*d*) XLI. Consol. Order. See Appendix.

ance, however, with its ordinary maxims, the Court requires that such applications be made on notice to all parties interested ; while it exercises a discretion as to dispensing with, or substituting service, where the circumstances of the case call for a relaxation of the rule (*f*). In a recent case, where two classes of persons (in the aggregate about eighty in number) appeared to be interested in the fund in Court, Sir W. P. Wood, V.-C., said that the Act gave a wide discretion, and that the petition might be served on two persons of each class (*g*). Notice of all proceedings in relation to the fund must be given to the trustee, in order that he may attend, and assist the Court in its distribution (*h*).

The jurisdiction of the Court under these Acts is founded upon the petition presented. Without a petition, therefore, the Court will not order a transfer to any other credit, or direct payment of dividend or maintenance, or make any other order dealing with the whole or any part of the fund lodged in Court (*i*). As

(*f*) See *In re Hodson*, 22 L. J. Ch. 1055 ; *In re Tillstone*, 9 Ha. App. 59. As to costs of petitioner and respondents, *In re Birch*, 2 Kay & J. 369, and cases there referred to.

(*g*) *In re Colson*, 2 Eq. Rep. 257.

(*h*) *In re Canthorpe*, 12 Beav. 56. When his assistance becomes no longer requisite, the Court will direct that the trustee be served with no further notices. *In re Magawley*, 5 De G. & S. 6.

(*i*) *In re Masselin*, 15 Jur. 1073 ; *In re Hedges*, 4 D. M. & G. 491, 3 Eq. Rep. 122; *In re Rye*, ib. 368. A claimant on the fund may proceed *in formâ pauperis*, 13 Beav. 109. No claimant will be allowed for his own convenience, or for any other reason, to proceed by suit in the ordinary way, instead of by *petition*, as prescribed by the Act. *In re Harris*, 2 Eq. R. 1110.

the administration of the trust fund under these Acts partakes of the character of a plenary suit, the petition should state fully all material facts within the petitioner's knowledge (*k*). Although the affidavit on which the fund was lodged need not be set out fully, the substance of it should be stated in the petition : for the statements in the affidavit form the only declaration of trust under which the Court can act (*l*).

The Trustee Relief Act (sec. 2) provides, that if it shall appear that the fund cannot be safely distributed without the institution of one or more suit or suits, the Court may direct any such suit or suits to be instituted. Without diminishing the power of the Court to administer the fund in all cases on petition, this section gives it power to require that a regular suit be commenced. It was at first considered that simple cases only would be dealt with in the manner prescribed by the Act, and that if any question of difficulty were involved in the administration of the trust, the Court would direct a bill to be filed (*m*).

A different view is now generally entertained, iuasmuch as questions of difficulty are continually disposed of by the Court of Chancery, on petition matters; still, questions may arise of such a nature that the Court

(*k*) The petition ought not merely to pray in general terms a distribution of the fund, it should specify the shares to which the parties are respectively entitled. *Leigh's Trust*, 2 Ir. Jur. N. S. 226.

(*l*) *In re Levett*, 5 De G. & S. 619 ; *In re Courtois*, 10 Ha. App. 64.

(*m*) *In re Williams*, 12 Beav. 322.

Suit may be directed.

Summary procedure not suited for all cases.

may consider a summary mode of procedure unsuited for the adjudication of them, and will direct a suit to be instituted. Thus, where the validity of a deed, forming the foundation of the petitioner's title, formed the subject of dispute, the Court intimated that the question could not satisfactorily be determined in a petition matter (*n*). In a later case it appeared that the petitioner claimed by a title adverse to the settlement under which the trustees had become possessed of the fund and had lodged it in Court: the Lords Justices declined to adjudicate on a petition under this Act, and directed a bill to be filed (*o*).

And the Court has declined on a summary petition to adjudicate upon breaches of trust alleged to have been committed by the trustees (*p*); or to determine whether the money paid into Court represents the entire trust fund (*q*); or to adjudicate on the validity of a deed (*r*).

Although the Court may (under sec. 2) direct a suit to be instituted, where the fund cannot conveniently be distributed in a petition matter, there is undoubtedly jurisdiction under the Act to decide all questions that may arise, by the more summary procedure. The juris-

Jurisdiction of the Court in petition matters under this Act.

(*n*) *In re Bloye*, 2 Hall & T. 140; 1 Mac. & G. 488; on appeal, 3 H. L. Cases, 607.

(*o*) *In re Fobzard*, 24 L. J. 441; see *In re Allen*, Kay, App. 51; *Exp. Crawford*, 2 Ir. Ch. Rep. 573.

(*p*) *Cooke v. West*, 9 Ha. 378; *In re Bloye*, 1 Mac. & G. 488.

(*q*) *Thorpe v. Thorpe*, 1 Kay & J. 438.

(*r*) *Way's Settlement*, 10 Jur. N. S. 1166.

diction conferred by this Act was lately considered in the House of Lords (on Appeal) when Lord St. Leonards stated that the Court of Chancery might make the same order upon an application by petition, with the right to rehear, and subject to appeal, as if a regular bill had been filed ; but the power was reserved to the Court itself, if it should think necessary, to direct a bill to be filed, and the matter to be solemnly argued : that was entirely in the discretion of the Court : the Act gave the same jurisdiction to the L. C. upon a petition, as if a bill were actually filed (*s*).

It has been seen that where a trustee lodges a part only of the trust fund in Court under this Act, he is discharged from liability *pro tanto*. He may, under some circumstances, find it advantageous to lodge in Court, from time to time, the annual dividends or proceeds of the trust property, where he is in doubt as to who may be entitled to receive them. Where a trustee is in a position to lodge a part only of the fund, he should, if possible, obtain from the Court a declaration of the rights of the parties ; as on such declaration he may afterwards safely act, without burdening the fund with the costs of lodging it in Court, and the *cestuique trust* with the expense of several applications for payment. Where the fund was small, the Vice-Chancellor expressed his unwillingness to burden it with the expense of repeated applications to the Court, in order to obtain payment of each half-yearly instalment : Inas-

Lodgment
of
part of trust
fund.

Declaration
of rights of
the parties.

(*s*) *Lewis v. Hillman*, 3 H. L. Ca. 607.

much as the trustee had thought proper to avail himself of this Act, he thought that he had jurisdiction to declare the rights of the petitioners, and also to direct that the trustee should pay the accruing shares according to the rights so declared: the order would afford ample indemnity to the trustee for making the payments (*t*).

Although the Act contemplates the presentation of the petition for distribution by the *cestuisque trust* or some of them, it is competent for a trustee himself, under special circumstances, to be the petitioner. Where from superior knowledge of the trust or from other circumstances, his continued interference is considered desirable by the parties beneficially entitled, the Court will distribute the fund on his petition alone (*u*).

The question was lately raised, whether the Court could act on the petition of trustees for distribution of the fund paid in by them. The assignees in Bankruptcy of the *cestuisque trust* objected that the petition could not be maintained: Sir W. P. Wood, V.-C., held otherwise, and said, "It is quite clear to me that I have jurisdiction to adjudicate upon a petition thus presented. It was at first doubted whether any relief could be given to respondents on a petition presented by a party in a different interest, but such jurisdiction was first exer-

(*t*) *In re Wright*, 1 Sma. & G. App. 6. As to petition and subsequent proceedings for distribution, *vide Appach, T. R. Act ; Morgan's Ch. St. and Orders.*

(*u*) *Re Cazneau*, 2 Kay & J. 249; *Re Hutchinson*, 1 Dr. & Sm. 27; *Re Trower*, 1 L. T. N. S. 54.

Petition
under the
Act may be
presented by
the trustee.

cised by Lord Cottenham, in *Gaffee's Trust* (*x*) ; and afterwards I took upon myself *In re Cooper*, where all the parties wished the petition to be so presented, to make an order upon a petition presented by trustees for the distribution of a fund paid into Court ; and my order was affirmed by the Lords Justices, without any objection on the point of jurisdiction (*y*)."

The petition for distribution of the fund should not be presented by trustees without the consent of the parties beneficially entitled, or other sufficient grounds for so doing. The circumstances which may justify the trustees in petitioning, and will entitle them to the costs of so doing, were recently adverted to by Sir W. P. Wood, V.-C., who said, "By the payment of the fund into Court, the trustees had secured to themselves all the indemnity to which they could possibly be entitled. Everything which they had the slightest interest in seeing done, was done. They were indemnified *in toto*. What right had they, after that, . . . to be the movers in a matter in which other parties were very materially interested, but in which they had no interest whatever ? If a trustee, having occasion to deal with another fund the distribution of which is dependent upon the manner in which the fund he has paid into Court may eventually be distributed, should find that fund allowed to remain undistributed, and the whole question allowed to be hung up indefinitely, it would be a different matter.

What will
justify the
trustee in
petitioning.

(*x*) 1 Mac. & G. 541.

(*y*) *In re Cazneau*, 2 Kay & J. 249.

But, in such a case, what is the duty of the trustee? Clearly not at this short notice to apply for its distribution; but to communicate with the parties claiming to be beneficially interested, and ascertain from them whether they are not going to take some steps to bring the matter to a conclusion. . . . I hope it will be sufficient discouragement to such conduct as the present, on the part of trustees, if I give them in this matter only such costs as they would have had if served with a proper petition (z)."

The Acts for the Relief of Trustees contain no provision whatever as to costs of proceedings; the Court of Chancery, therefore, in administering trust funds under these Acts, applies its ordinary rules as to costs, so far as the nature of the case will admit of so doing.

Previous to lodging the trust fund in Court under the provisions of the Act, the trustee is at liberty to deduct from it a sum sufficient to cover his costs and expenses. An improper deduction will render him liable to proceedings under the ordinary jurisdiction of the Court, although the *cestuisque trust* can obtain no remedy under the Trustee Relief Act (a). Where the amount of a legacy is paid in under the Act, the executor or administrator is not, however, justified in making any such deduction; the costs incidental to the payment into Court ought to come out of the testator's

(z) *In re Cazneau*, 2 Kay & J. 249.

(a) *In re Bloye*, 1 Mac. & G. 488; *Re Barber*, 9 Jur. N. S. 1098. In Ireland, a trustee lodging a fund in Court may, in an ordinary case, deduct 8*l.* for costs. *In re Boyd*, 1 Ir. Rep. Eq. 489 (M. R.)

Costs under
Trustee Re-
lief Act.

Costs of
lodging fund
may be
deducted.

residuary estate, as though no proceedings had been instituted under the Act (*b*). Where part of the general or residuary fund happens to be in Court, payment of these costs will be ordered out of it (*c*), unless it be standing to a distinct account (*d*).

Where the entire trust fund has been lodged in Court under the provisions of the Trustee Relief Act, without making deduction for costs, the trustee will apply, on the hearing of the petition, for payment of his costs. Where the proceeding is considered a justifiable and proper one on his part, a direction will be given that his costs of lodging the fund, and of subsequently attending the Court to assist in its distribution, be taxed as between solicitor and client, and these, together with all "charges and expenses reasonably incurred," will be paid out of the fund in Court (*e*).

Where a trustee has proceeded under this Act wantonly and without cause, the Court will charge him with the costs (*f*).

The general costs of administering a trust fund under this Act, including the trustee's costs of lodging the fund in Court, and of subsequently appearing on the petition, will be paid out of the *corpus* of the fund

Costs of the
trustee
ordinarily
allowed.

Out of what
fund costs
will be paid.

(*b*) *In re Canthorne*, 12 Beav. 56; see *Re Jones*, 3 Drew. 679.

(*c*) *In re Ham*, 2 Sim. N. S. 106.

(*d*) *In re Hodgson*, 18 Jur. 786.

(*e*) *In re Biddulph*, 5 De G. & S. 473; Seton Decrees, 381; *In re Webb*, L. Rep. 2 Eq. 456.

(*f*) *In re Woodburn*, 1 De G. & Jon. 333. A trustee instituting a suit where a lodgment in Court under this Act would have answered the purpose, is only entitled to the costs of the latter. *Wells v. Malbon*, 31 Beav. 48.

where it is considered that they have been incurred for the common advantage of all parties interested.

The costs of proceedings by *cestuisque trust* for payment of the fund are in the discretion of the Court, and will be ordinarily allowed in the same way. The authorities were conflicting as to whether the costs of a petition by a tenant for life of the trust fund for payment of dividends will be paid out of the *corpus*, or out of the annual proceeds only (*g*).

The following rule appeared for a time to prevail—costs of trustees in relation to the fund lodged by them to be payable out of the capital; but costs of a petitioner having a life interest in the fund, out of the dividends or income (*h*). But in order to obviate the necessity of serving the remaindermen, the judges are now evidently disposed to throw the costs on the annual proceeds, and so dispense with such service (*i*).

It has been stated that trustees are not permitted to lodge money in Court under this Act unnecessarily and vexatiously. Where retiring trustees had expressed their approval of an appointment of their successors,

Costs disallowed where the fund is lodged vexatiously.

(*g*) *In re Ross*, 15 Jur. 241; *In re Butler*, 16 Jur. 324; *In re Field*, 16 Beav. 146; *Re Leake's Trust*, 32 Beav. 135; *Contrà, In re Bangley*, 16 Jur. 682; *In re Ingram*, 18 Jur. 811; *In re Taaffe*, cited in Reilly on Summary Petitions (Ireland), 241; *In re Hammersley's Settlement*, 23 Beav. 267.

(*h*) *Re Hadland*, 23 Beav. 266.

(*i*) *Exp. Peart*, 17 L. J. Ch. 168; see 9 W. R. 475 and 830; the ultimate view appears in *Re Marner's Trust*, 1 W. N. 329; 12 Jur. N. S. 959; and this was followed more recently, *In re Cameron*, 1 Ir. Rep. Eq. 258.

and had allowed a deed of new appointment to be executed by the *cestuisque trust*, but afterwards refused to transfer the fund to the new trustees, and lodged it in Court, they were deprived of their costs (*k*). In another case the executors of a will had received notice that a bill was about being filed against them, charging them with a breach of trust: it was held, that to lodge the fund in Court under such circumstances was an abuse of the Act, and disallowed all the costs of the executors (*l*). In a later case trustees, without any assignable reason, had paid the fund into Court, and in their affidavit stated that the petitioners were the only parties interested in it. The petitioners, when they heard of the intended lodgment, served a cautionary notice on the trustees, stating that objection would be made to their receiving costs. The Court held, that as no doubt existed as to who was entitled to the fund, no costs of appearing should be allowed to the trustees (*m*). But according to later decisions, the trustees would, in such a case, be ordered to pay the costs occasioned by their misconduct (*n*).

The County Courts Act, 1867 (*o*), enables a trustee Lodgment c

(*k*) *In re Fagg*, 19 L. J. (Ch.) 175.

(*l*) *In re Waring*, 16 Jur. 652. In the extreme case of a trust fund paid into Court after the institution of a suit, trustees were ordered to *pay all the costs* of proceedings. *Wright v. West*, 1851; cited Darl. T. R. Act, 19.

(*m*) *In re Covington*, 25 L. J. 238; see *In re Lane*, 24 L. T. Rep. 181.

(*n*) *In re Woodburn*, 1 De G. & Jon. 333; and other cases cited above.

(*o*) 30 & 31 Vict. c. 142, ss. 24, 25. See Appendix.

trust money
in the County
Court. to lodge any money or securities not exceeding in amount £500, in the name of the Registrar of the County Court, instead of making such lodgment in the Court of Chancery under the Trustees Relief Act. There is required of the trustee an affidavit stating shortly the instrument creating the trust: and the future disposition of the fund will be in the discretion of the County Court judge, who is invested for these purposes with all the powers and authorities given to the Court of Chancery by the Trustee Relief Act.

CHAPTER VII.

OF THE POWERS, DUTIES, AND LIABILITIES OF TRUSTEES OF REAL PROPERTY (a).

As legal owner, the trustee of real estate may bring ejectments, or institute such other proceedings at law as may be required: a trustee has even been allowed to recover the estate in ejectment against his *cestuique trust*, who is at law only in the position of a tenant at will (b). Trustee as legal owner may bring actions.

In an action of ejectment a Court of Law will not take into consideration the equitable title, as it is enabled in many instances to do under the Common Law Procedure Acts (c). The proper remedy of the *cestuique trust* would be by injunction in equity, to restrain the trustee from improperly using his legal title (d).

(a) It will be convenient throughout this Chapter to adopt the words of the interpretation clause of Stat. 16 & 17 Vict. c. 51, and include "leasehold and other hereditaments" under the denomination of real property.

(b) *Doe v. Phillips*, 10 Q. B. Rep. 130; and cases cited in Tudor Le. Ca. Conv. (2nd ed.), 15.

(c) *Neave v. Amery*, 16 C. B. R. 328.

(d) *Roe v. Reade*, 8 T. R. 122; *Shine v. Gough*, 1 B. & B.

Custody of
title deeds.

A trustee in whom, at law, the estate is vested, is entitled to the custody of the deeds: a merely equitable interest will not confer upon any other person the right to hold them. Where the possession of the deeds has enabled a tenant for life to represent himself as being absolute owner of the estate, under circumstances of gross negligence, amounting to constructive fraud on the part of the trustee, the latter has been held personally liable for the consequences (*e*).

The *cestuisque trust* are, however, entitled at reasonable times to inspect title deeds and other documents in the hands of the trustee (*f*). Trustees, although bound to act together, and not to delegate duties, are allowed to leave the actual custody of deeds, &c. with one of their number, for any other rule would be productive of great inconvenience (*g*).

Most of the rights and privileges arising out of the legal ownership of the estate, and by the common law, therefore, capable of being enjoyed by a trustee, have, by several Acts of Parliament, been conferred upon the beneficial owner. The Statutes defining the rights of voters at elections, expressly recognize estates in

445; where the name of the trustee is made use of in legal proceedings by his *cestuique trust*, the latter may be compelled to indemnify him against costs; *Annesley v. Simeon*, 4 Mad. 390.

(*e*) *Evans v. Bicknell*, 6 Ves. 174; see *Meux v. Bell*, 1 Ha. 82.

(*f*) *Wynne v. Humberston*, 27 Beav. 421.

(*g*) Per Wood, V.-C. in *Cottam v. E. C. R. Company*, 1 John. & Hem. 243.

Other rights
incident to
ownership.

Equity (*h*), and prohibit mere trustees from voting. The legal right to present to an advowson held in trust is still vested in the trustee: but he may be, in Equity, compelled to present the clerk nominated by his *cestuique trust* (*i*).

The degree of control that may be exercised by the trustee of settled estates will depend altogether on the intentions of the settlor, as expressed by the instrument, and on the existence of a tenant for life of full age, and capable of attending to the management of the property. Where there is nothing to preclude the management and possession of the estates by the trustee he will, in general, be justified in interfering in them so far as may be requisite for the purpose of carrying out the trusts. Further than this he cannot safely go (*k*). To assume the power of releasing or compounding debts, or making leases to tenants, or forgiving large arrears of rents due by tenants, without express authority, would be, under ordinary circumstances, to incur a degree of risk which cannot be advised. Cases have, indeed, occurred of these powers being exercised, and of their exercise being upheld by the Court; but these decisions have been founded on the special cir-

Control over
settled
estates.

(*h*) 9 Anne, c. 5; 2 Will. IV. c. 45, sect. 23; 6 Vict. c. 18, s. 74.

(*i*) *Albemarle (Earl of) v. Rogers*, 2 Ves. jun. 477; see 2 Y. & Coll. C. C. 139. The right of nomination may be exercised by an *infant cestuique trust*; *Arthington v. Coverley*, 2 Eq. Ab. 518. As to exercise of this right where the parties are numerous, see 6 D. M. & G. 439.

(*k*) See *Powys v. Blagrave*, 4 D. M. & G. 458.

cumstances of each case, and no general principle can be therefore deduced from them (*l*).

Land Improvement Act, 1864.

The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), enables trustees in the actual possession and receipt of the rents of lands to carry out certain improvements, as drainage, reclamation of land, erection of farm buildings, &c. Where from the nature of the case a trustee has to repair a mansion house, he must be careful that the repairs are such only as are absolutely necessary, and not expensive improvements of an ornamental character (*m*).

Leases of settled estates.

The difficulties in the way of granting leases of lands in settlement were to a great degree removed by the "Act to facilitate Leases and Sales of Settled Estates" (*n*), which, after reciting that "it is expedient that persons in possession of land, for certain limited interests, should have power to grant agricultural or

(*l*) The following cases on the management of trust estates may be referred to:—*Blake v. Bunbury*, 1 Ves. jun. 194 and 514; *Tidd v. Lister*, 5 Mad. 429; *Bowes v. Strathmore*, 8 Jur. 92; *Denton v. Denton*, 8 Jur. 388. As to componnding debts and arrears of rent, see *Jevon v. Bush*, 1 Vern. 342; *Blue v. Marshall*, 3 P. W. 381; *Alexander v. Alexander*, 12 Ir. Ch. Rep. 1; *Re Alexander*, 13 Ir. Ch. Rep. 137; *Wiles v. Gresham*, 5 D. M. & G. 770. As to power of granting leases, see *Naylor v. Arnitt*, 1 Russ. & M. 501; *Drohan v. Drohan*, 1 Ball & B. 185. As to obligation to insure house property, see *Dobson v. Land*, 8 Ha. 216; *Fry v. Fry*, 27 Beav. 146.

(*m*) *Bridge v. Brown*, 2 Y. & C. C. C. 181; *Bleazard v. Whalley*, 2 Eq. R. 1093.

(*n*) 19 & 20 Vict. c. 120 [England and Ireland]. The Amendment Acts are 21 & 22 Vict. c. 77, and 27 & 28 Vict. c. 45.

occupation leases thereof, at a rackrent for a reasonable period," enacted, that leases may be made on certain terms and conditions prescribed by the Act.

Section 10 provides, that when the Court shall deem it expedient that any general powers of leasing any settled estate, conformably to the Act, should be vested in trustees, it may, by order, vest any such power accordingly, in the existing trustees of the settlement.

Where the settlement contains no leasing power, and it becomes desirable that leases should be granted, the proper course will be to apply to the Court under this Act, for an order vesting "general powers of leasing" in the trustees ; and such powers they will be careful to exercise in all respects in conformity with the terms of the power.

It has been usual in family settlements of land to vest an estate of freehold in trustees, in order that the interposition of this estate may prevent the operation of a rule of law, according to which the contingent remainders would be defeated or destroyed by the forfeiture or other determination of the preceding estate of a tenant for life. By the statute 8 & 9 Vict. c. 106 (sec. 8), all contingent remainders are rendered capable of taking effect, notwithstanding the determination, by forfeiture or otherwise, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened. This enactment does not, however, affect the necessity for a contingent remainder taking effect as formerly, if not previously determined by forfeiture, surrender, or merger. The estate for preserving contingent re-

Trustees to
preserve con-
tingent re-
mainders.

mainders will therefore continue to be necessary for all purposes, except to preserve them from destruction by the act of the tenant for life (*o*).

The effect of the late Act, however, and of the Fines and Recoveries Act (*p*), is to render the estate of trustees to preserve contingent remainders one of little practical importance, as their concurrence in any Act can now scarcely ever be required. The uncertainty as to what circumstances would justify such trustees in joining in a deed to destroy the contingent remainders, it is not, therefore, material to observe upon. If called on to join in any act, their safest course would, doubtless, be, to refuse to do so, without the direction of the Court (*q*). The only *active* duty that was required of trustees to preserve contingent remainders, was interference to prevent waste of the estate (by cutting down of timber, &c.), by the tenant for life (*r*).

Powers and
duties of
trustees for
sale.

The trustees acting under a power of sale, or words amounting to an authority to sell, or on whom the duty of selling devolves from the nature of the trust, are alike "bound to bring the estate to the hammer under every possible advantage to the *cestuisque*

(*o*) 1 Jarm. Wills, 2 edit. 742.

(*p*) 3 & 4 Will. IV. c. 74, sects. 22, 27, 29, and 34; Sugd. Real. P. Stat. 181, *et seq.*

(*q*) "It is better for trustees never to destroy the remainders, even if the tenant in tail of age concurs, without the direction of the Court," per Lord Eldon in *Biscoe v. Perkins*, 1 Ves. & B. 491.

(*r*) *Garth v. Cotton*, 1 Ves. 524, 546; 1 Lead. Ca. Eq. 451. As to duty of trustee to uses to bar dower, see *Collard v. Roe*, 6 W. R. 348, Q. B.

trust(s):^s and this maxim contains nearly all that can be required for their guidance in selling. Trustees for sale are not at liberty to leave the property unsold, and to raise money by a mortgage. If the property is under such circumstances depreciated they may have to make good the loss (*t*). They must proceed to sell: and in so doing they are bound to use such exertions as an ordinary vendor would use in order to obtain a good price for his own estate. If a sale by auction (a mode of selling which should generally be preferred by trustees) be not attended with a satisfactory result, the trustees may safely accept an adequate offer to purchase by private contract; or they may sell in separate lots, or partly at one time and partly at another. Trustees are bound to sell for the highest price that is offered (*u*), but with regard to all the details of the sale, they are at liberty to exercise a discretion (*v*). Their object should be the common *advantage of the cestuisque trust*; and so far as they are not controlled by the terms of the trust, they may, in the *bonâ fide* exercise of discretion, adopt such measures as may seem best adapted for the attainment of that object.

(*s*) Per Lord Eldon in *Downes v. Grazebrook*, 3 Mer. 208; see *Fry v. Fry*, 27 Beav. 144.

(*t*) *Devaynes v. Robinson*, 24 Beav. 86; and see 5 Jur. N. S. 1047.

(*u*) *Harper v. Hayes*, 2 Giff. 210; but they should not sell to one of their number, *Denton v. Donner*, 23 Beav. 285.

(*v*) *Pechel v. Fowler*, 2 Anst. 550; *Ord v. Noel*, 5 Madd. 440; *Mortlock v. Buller*, 10 Ves. 292; *Wilkins v. Fry*, 1 Mer.

Sale by
Auction Act,
1867.

The provisions of the "Sale of Land by Auction Act, 1867" (*x*), must be attended to by trustees for sale who determine to sell by auction. That Act settles a long disputed question as to the employment of a "puffer," or person bidding on behalf of the vendor, by declaring that a sale which is invalid at law by reason of the employment of a puffer shall also be invalid in equity; and by enacting that the particulars and conditions of sale shall state whether there is a reserve price or not, and if there be no statement warning purchasers of a reserved price, no puffer, or bidder for the vendor, shall be allowed to bid. But the vendor may, if he think fit, expressly reserve the right to bid. This Act further prohibits the Court of Chancery from opening the biddings, except on the ground of fraud or improper conduct in the management of the sale.

Time when
trustees
should sell.

The time of sale, no less than the mode of sale, must be determined on by the trustees with a due regard to the directions given by the instrument creating the trust, and also to the interests of all their *cestui-que trust* (*y*). General words directing a sale "with

268; *Hobson v. Bell*, 2 Beav. 17. As to sale by private contract, see *Davey v. Durrant*, 1 De G. & Jon. 535; as to the employment of an agent to conduct the sale, see *Rossiter v. Trafalgar Company*, 27 Beav. 277; as to special conditions of sale, see *Falkner v. Equitable Society*, 4 Drew. 352.

(*x*) 30 & 31 Vict. c. 48—extending to Ireland.

(*y*) If an estate be given to A. for life, and after then a sale is directed, the trustees cannot sell during the lifetime of A. *Johnstone v. Baber*, 8 Beav. 233.

all convenient speed," will not render it obligatory on the trustees to sell without such an interval as may be in their judgment required for preparation ; nor will a direction to sell "at such time, and in such manner as the trustees shall think fit," justify them in postponing the sale indefinitely, for to do so might interfere with the intention of the settlor by affecting the relative interests of tenant for life, and those in remainder (z). "Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price ; and that in the execution of the trust they will pay equal and fair attention to the interest of all persons concerned. If trustees, or those who act by their authority, fail in reasonable diligence—if they contract under circumstances of haste and improvidence—if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust, at the expense of another party, a Court of Equity will not enforce the specific performance of the contract" (a).

It is presumed that trustees may exercise a discretion as to buying in the estate, notwithstanding a case before Shadwell, V.-C., where trustees for sale had

Trustees
buying in at
the sale.

(z) *Buxton v. Buxton*, 1 My. & C. 80 ; *Walker v. Shore*, 13 Ves. 391 ; *Garrett v. Noble*, 6 Sim. 504 ; *Fry v. Fry*, 27 Beav. 144.

(a) Sugd. V. & P. ; see *White v. Cuddon*, 8 Cl. & F. 766 ; Sugd. H. of L. 589, *et seq.* The Court will not compel performance of any contract for sale entered into by a trustee which would in itself be a breach of trust, *Sneesby v. Thorne*, 7 D. M. & G. 399 ; *Mulholland v. Belfast*, 9 Ir. Ch. R. 204.

put up the estate to auction, but the price being considered insufficient they bought in, and some years afterwards the property was sold for a much lower sum ; and they were held responsible for the difference (*b*). Probably special circumstances influenced the decision of the Court ; for it is not to be supposed that trustees, exercising a discretion *bonâ fide*, and miscalculating the value (as any vendor is liable to do), would in all cases be held liable for the loss sustained. Doubtless this case led to the express enactment enabling trustees of the trusts created since August, 1860, to buy in and resell (*c*).

Powers of
trustees for
sale.

The intention of the creator of the trust is, in the construction of trusts for sale as elsewhere, to be followed as closely as possible. Where an intention appears that the estate shall be converted into *money*, it is not competent for trustees for sale to sell in consideration of a rentcharge or annuity (*d*). And it has been held that a bequest of leaseholds to certain persons, upon trust to sell and invest the proceeds for the benefit of persons, some of whom are infants, will not enable the trustees to grant an underlease ; and the Court has refused to enforce specific performance of an agreement to take such an underlease (*e*). Nor are trustees for sale authorized to execute a mortgage,

(*b*) *Taylor v. Tabrum*, 6 Sim. 281.

(*c*) 23 & 24 Vict. c. 145, s. 2; see Appendix of Statutes.

(*d*) 2 Sugd. Powers (7 edit.) 488.

(*e*) *Evans v. Jackson*, 8 Sim. 217; Wms. Exors. (5 edit.) 845.

where the terms of the trust indicate an intention that the estate should be absolutely converted into money (*f*) ; but where the intention appears to be not that the estate shall be converted into money, but only that certain charges shall be paid out of the estate, the trustees may effectuate that intention by raising money on mortgage. This question arose in a case (*g*) where the estate was devised, charged with debts, to trustees upon certain trusts, in strict settlement, with a power of sale and re-investment of the money. Lord Cottenham held that a power was given by implication to mortgage the estate for payment of the debts ; he observed that, so long ago as 1724 (*h*), it seems to have been assumed as settled, that "a power to sell implies a power to mortgage, which is a conditional sale," and no case had been quoted throwing any doubt on that proposition : This, however, was not a mere power to sell, it was a trust to raise money out of the estate to pay debts : It would, indeed, be most injurious to the owners of estates charged, if the trustee could effect the object of his trust only by selling the estate (*i*). When they
may mort-
gage.

If a mortgaged estate be vested in trustees on trust to sell and pay off the mortgage, they may if they Equity of
redemption.

(*f*) *Haldenby v. Spofforth*, 1 Beav. 390 ; *Page v. Cooper*, 16 Beav. 396 ; *Devaynes v. Robinson*, 24 Beav. 86. Nor does a trust to raise money by mortgage justify a sale, *Drake v. Whitmore*, 5 De G. & S. 619.

(*g*) *Ball v. Harris*, 4 Myl. & C. 264, see 268.

(*h*) *Mills v. Banks*, 3 P. W. 1, see p. 9.

(*i*) *Ball v. Harris*, 4 Myl. & C. 268.

think it expedient sell the property *subject to* the mortgage (*k*).

Implied power of sale.

Where a power to sell out of the funds and invest in land was conferred, but no express power of selling the land, it was held that the trustees had a power of sale over real estate purchased by them (*l*).

Powers of sale and exchange.

It has long been *vexata quæstio*, whether the powers of sale and exchange, usually conferred on trustees of settlements, will authorize them to effect a partition. In the case of *Abel v. Heathcote* (*m*), where the power was *to make sale of, or convey in exchange*, the power received a liberal construction, on the ground that a partition was in effect an exchange; as the consequences and effects of a partition and exchange, as to the interests of the parties, are precisely similar.

In another case the power authorized a *sale only*, and it was decided by Lord Eldon that such power did not authorize a partition whatever a power of exchange might do; and he expressed the same opinion on subsequent occasions (*n*).

“ It might be true that a power of exchange does not necessarily include a power to make a partition in all cases: where, for instance, the partition is to be made between three or more parties, as was the case

(*k*) *Manser v. Dix*, 8 D. M. & G. 703.

(*l*) *Tait v. Lathbury*, L. R. 1 Eq. 174.

(*m*) 4 Bro. C. C. 277; 2 Ves. jun. 98.

(*n*) *M'Queen v. Farquhar*, 11 Ves. 467; see 4 Bro. C. C. 277 (note); *Atty.-Gen. v. Hamilton*, 1 Mad. 214.

in *Abel v. Heathcote*; but it does not follow from thence, that where there are only two parties, the exchange of a moiety of one part of the land held in common, for a moiety of the other, is to be considered bad, because it effectuates a partition" (*o*). A partition may, however, be made by a circuitous process when there is a power of sale. The undivided part of the estate may be sold, and the purchase-money may be afterwards laid out in the purchase of the divided part; and although the sale be fictitious, it has been asserted that the transaction cannot be impeached (*p*).

Where power was given to the trustees to *sell and dispose of* the testator's real estate, and to give receipts; it was argued that the words *dispose of* were placed in contrast with the word *sell*, and authorized, by implication, a partition, which was necessary to enable the trustee to sell the property to advantage. Lord Romilly, M. R., after reviewing all the former decisions, held that the words relied on, amounted to no more than a simple power of sale; and that consequently the discretion given to the trustees was confined to a sale, and disposition by sale, of the property: It was therefore not competent for the trustees of the will to enter into any valid and binding agreement for

A power to sell does not authorize a partition.

(*o*) Per Rolfe, B. (Lord Cranworth) in delivering the judgment of the Excheq. in *Doe v. Spencer*, 2 Excheq. R. 752, *vide* 770.

(*p*) 2 Sugd. P. 482 (7 edit.) It is clear that a power to make partition of an estate will not authorize a sale or exchange of it (*ib.* 479).

partition, without the consent and authority of all their *cestuisque trust* (*q*).

Trustees for sale acting under a deed or will executed subsequently to 28th August, 1860, will have their powers defined and enlarged by the following clauses of Lord Cranworth's Act (23 & 24 Vict. c. 145).

Section 1 provides, that trustees with a power of sale may sell the property either together or in lots, and either by auction or private contract, and at one time or several times ; and (if the power shall authorize an exchange) may exchange lands for other lands, in England, Wales, or Ireland, and on such exchange may give or receive money for equality of exchange.

Section 2 authorizes trustees for sale to insert special terms and conditions of sale, and to buy in at any sale, and to rescind or vary any contract, and to re-sell without being liable for any loss occasioned thereby.

Section 3 gives to the persons empowered to sell or exchange as above, full power to convey or otherwise dispose of the hereditaments, either by way of revocation and appointment, or otherwise, as may be necessary.

Section 4 provides, that the money received on such sale or exchange shall be laid out as directed by the

(*q*) *Brassey v. Chalmers*, 16 Beav. 228. Several other points arose in this case, which afterwards came before the Lords Justices on appeal. On the point mentioned above, they expressed concurrence in the decision. A partition suit was, however, instituted ; and the partition theretofore made, being for the benefit of all parties, was adopted. 4 D. M. & G. 534, 536.

will or deed creating the trust; and if no such indication be contained in it, then the money shall be re-invested in the purchase of other freehold or leasehold hereditaments in England, Wales, or Ireland, subject to the subsisting uses or trusts; and such hereditaments so purchased or taken in exchange shall be settled to the uses, for the trusts and purposes, and subject to the powers and provisoies to which the hereditaments so sold or exchanged would have been subject. But no leasehold tenement shall be purchased under the last-mentioned power, which is held for less than sixty years.

Section 5 empowers the trustees to apply the purchase-money, &c. in paying off mortgages or other incumbrances.

Section 6 prohibits the re-investment of money arising from sale of lands in one country, in land in another country; so that the produce of English estates cannot be laid out in Ireland, and *vice versa*; nor can estates situate in the two kingdoms be exchanged.

Section 7 directs, that money shall be invested at interest, until laid out in the purchase of lands as above mentioned.

Section 8 empowers the trustees of renewable leaseholds to renew, and directs them so to do on the requisition of any person beneficially interested, but this does not apply to any case where the person in possession for life is entitled to enjoy the property *without*

any obligation to renew the lease, or to contribute to the expense of renewal.

Section 9 enacts, that if money be required for paying any equality of exchange, or renewing any lease as aforesaid, the trustees may apply the trust funds for that purpose; and, if no funds be available, they may mortgage the hereditaments to raise the required sums; and no mortgagee under this section shall be bound to see that such money is wanted, or that no more is raised than is required.

Section 10 directs, that no sale, exchange, &c. as aforesaid, shall be made without the consent of the person appointed by the deed or will to consent, or of the tenant for life of the hereditaments.

As before stated, this act applies only to trusts created subsequently to the 28th day of August, 1860 (*q*).

Trustees, empowered to sell for payment of debts or other charges, should be careful, before executing the trust, to ascertain, by means of a valuation, that after payment of specific charges there will be a surplus available for the costs and expenses incurred in carrying out the trust. In a recent case of this nature, the trustees had instituted a suit to administer the trust, and the sale took place under decree; but the fund produced proving deficient for payment of the charges prior to the trust, all the costs were disallowed (*r*).

(*q*) These enactments will be found in the APPENDIX.

(*r*) *White v. Villiers*, 3 Ir. Ch. Rep. 125.

Costs payable only out of surplus.

Settled Estates Act.

Sections relating to trustees.

The Act to facilitate leases and sales of settled estates (s) enables the Court of Chancery, in certain cases, to authorize sales of settled estates; where such sales shall appear proper and consistent with a due regard to the interest of all parties entitled under the settlement.

Section 19 provides, that notice of any application to the Court under the Act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose concurrence is required.

Section 23 declares, that purchase-moneys arising from sales under the Act may, if the Court shall think fit, be paid to any trustees of whom it shall approve.

Section 24 directs, that the application of the money may, if the Court shall so direct, be made by the trustees, without any application to the Court, or otherwise as may be ordered (t).

In conveying to a purchaser, a trustee for sale cannot be required to convey by any other words or description than that by which the conveyance was made to himself (u); nor is he bound to enter into any covenants for title except the usual covenant against his own acts (x).

The purchase-money should be received by the trustee

Conveyance to a purchaser.

(s) 19 & 20 Vict. c. 120 [England and Ireland].

(t) As to sales under this Act, see *Re Mallins*, 3 Giff. 126. As to the respective rights of tenants for life and remainder-men, to the incidental profits of a settled estate, see *Cowley v. Wellesley*, L. R. 1 Eq. 656.

(u) *Goodson v. Ellison*, 3 Russ. 594.

(x) *Stephens v. Hotham*, 1 Kay & J. 571.

himself, and if there are several it should be lodged in a bank to their joint account. A solicitor or agent, unless specially authorized, cannot give a valid discharge (*y*).

The Transfer of Land Act (25 & 26 Vict. c. 53) provides that trustees for sale of the fee simple may apply for registration under the Act (*z*). Also that they may apply for a judicial sale by the Court of Chancery with indefeasible title (*a*). The trusts, if any, on which registered land is held, are entered on the Record of Title kept under the Act, and this is done by reference to a printed copy of the deed lodged in the Land Registry Office (*b*).

The analogous Act in Ireland (*c*) affords an option of either recording trustees for sale as owners without mention of the trusts, or of stating the trusts.

In the former case the trustees can at any time sell and transfer to a purchaser, who can make no inquiry as to the nature of their title; and by the entry of a suitable note "survivorship" may be excluded so as to prevent any unauthorized sale by one trustee.

Both the Acts provide for the authorizing or com-

(*y*) *Re Fryer*, 1 Kay & J. 317; see *Viney v. Chaplin*, 2 De G. & Jon. 468. As to the powers of trustees who are directed to sell an *aliquot part* of an estate, see 32 Beav. 555; 34 Beav. 107.

(*z*) Section 4.

(*a*) Section 41.

(*b*) See "Land Transfer, &c." by Urlin & Key, pp. 55, 103.

(*c*) 28 & 29 Vict. c. 88, ss. 2, 41, 48.

pelling a transfer of trust property, and the vesting of trust property, as under the "Trustee Acts" (d).

Well-drawn instruments creating trusts for sale of real estate expressly confer on the trustees the power of giving valid discharges for the purchase-money. As this clause is sometimes found to have been omitted, and as the new enactments are not retrospective, it will be necessary to inquire how far, in the absence of such authority, the receipt of the trustees alone will be a valid discharge (e).

Receipt of
trustees not
in general a
valid dis-
charge for
purchase-
money.

The persons entitled to the produce of the sale are *in Equity* considered the owners; and the trustees are merely looked upon as instruments for carrying the trust into execution. *Prima facie*, therefore, a receipt for the purchase-money must be signed by the beneficial owners. This rule applies in all cases where no intention, express or implied, can be found in the instrument creating the trust, that the receipt of the trustees shall of itself be a sufficient discharge (f). Thus, in the ordinary case of lands conveyed or devised in trust for the payment of certain charges or

(d) English Act, section 95; Irish Act, section 31.

(e) A general power to trustees for sale, of giving valid discharges, was provided by Stat. 7 & 8 Vict. cap. 76, sec. 10, which came into operation on the 1st January, 1845. This power was altogether taken away by Stat. 8 & 9 Vict. c. 106, s. 1, as from the 1st October, 1845. It is now conferred as to deeds &c., executed after the passing of the new act, as hereafter stated.

(f) There is no exception in favour of sales under a decree of the Court of Chancery, or under an Act of Parliament. All the cases on this subject are collected in the works of Lord St. Leonards and Mr. Dart on V. & P.

legacies specified in the deed or will, or in a schedule to it, the purchaser is bound to ascertain that his purchase-money is applied in payment of such charges (g).

The reluctance of the Court to imply a power in trustees for sale, of giving valid discharges, was exemplified in a case (h) where a testatrix by her will declared that every person thereby made tenant for life should have such powers of leasing, selling, and exchanging as were by her father's will given to the tenants for life and in tail mentioned in his will, or to the trustees thereof. The will of her father only contained a declaration that it should be lawful for the trustees, at the request of the tenant for life, to dispose of and convey, either by way of absolute sale, or in exchange, any part of the hereditaments, &c., and declared that it should be lawful for the trustees to sign and give any receipt or receipts for the money for

(g) "Where a purchaser is bound to see the money applied according to the trust, and the trust is for the payment of debts or legacies, he must see the money actually paid to the creditors or legatees. In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one. Or, if the creditors or legatees are but few, they may be made parties to the conveyances. Another mode by which the purchasers may be secured is, an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges; and then the trustee can be made a party to the several conveyances." Sugd. V. & P. (edit. 1851) 522.

(h) *Cox v. Cox*, 1 Kay & J. 251.

Power of
giving re-
ceipts will
not in
general be
implied.

which the same should be sold, &c., and then proceeded to declare that such receipts should be sufficient discharges. It was held that the powers of the tenant for life, under the will of the testatrix, extend to giving receipts. Sir W. P. Wood, V.-C., observed that the power of giving receipts was a power separate from powers of sale and exchange: It was a power by no means inserted as of course in legal instruments, it was often excluded, and where excluded, had never, except under very special circumstances, been held to be capable of being implied (*i*).

Another instance of the strictness with which the Court construes this power was where trustees were empowered to receive a sum of *stock* with a power of varying securities. The same eminent judge decided that they could not give a discharge for *cash* (*k*). Strict construction of power.

But it seems to be settled that a power of varying

(*i*) The rules applicable to sales of personal and chattel property by executors, are very different. An executor, with or without the concurrence of his co-executor, may sell, assign or mortgage, either at law or in equity, any part of his testator's personal estate, and whether it be specifically bequeathed or otherwise; nor need a purchaser make any inquiry as to the necessity for such sale, or the destination of the purchase money. Fraud or collusion may, however, vitiate the sale; and a purchaser who has notice that the property is specifically bequeathed, or that there remain no debts or legacies unsatisfied, could not safely purchase from the executor. All the cases are collected in Ld. St. L. on. V. & P.; Wms. Exors. (6 edit.) 633, *et seq.*; Lewin on Trusts, 5 ed. 353.

(*k*) *Pell v. De Winton*, 2 De G. & Jon. 13.

securities will give by implication a power to the trustees to give receipts (*l*).

An intention that the receipt of trustees for sale shall be a sufficient discharge, will be implied wherever the deed or will creating the trust contains a trust of so general and unlimited a character as to render it practically impossible for the purchaser to see to its execution. Thus where the sale is directed for the payment of debts generally, and payment of specific sums be directed in addition, the receipt of the trustees will suffice (*m*). The case will not be altered after payment of all the debts; for the question is one of construction of the deed or will, and *this can be affected by no subsequent event (n)*.

This is a rule of construction, not depending for its application on the state of affairs at the testator's death or at any subsequent period. It was finally established by Lord Lyndhurst in the case of *Forbes v. Peacock (o)*.

(*l*) *Loek v. Lomas*, 5 De G. & Jon. 326.

(*m*) *Robinson v. Lowater*, 17 Beav. 592; 5 D. M. & G. 272. If a testator charges his land with debts (thus giving a power of sale by implication) but limits it for life or other estates, it is then out of the power of the devisees in trust to sell, but the court will if possible imply a power of sale of the equitable interest in the executors; and the legal estate will have to be transferred by the heir or devisee, or advantage taken of the appropriate section of the Trustee Act, see *Eidsforth v. Armstead*, 2 Kay & J. 333; *Wrigley v. Sykes*, 21 Beav. 337; *Sabin v. Heape*, 27 Beav. 553.

(*n*) *Shaw v. Borrer*, 1 Keen, 559; *Page v. Adam*, 4 Beav. 269; *Johnson v. Kennett*, 3 My. & K. 624; *Forbes v. Peacock*, 1 Phill. 717.

(*o*) 1 Phill. 722. This case was "commented on" by Lord

Power of
giving dis-
charges im-
plied.

Where trust
of a general
character.

Rule in
*Forbes v.
Peacock.*

In his judgment his lordship said—"The estate being charged in the first instance with the payment of debts, the defendant was not bound, according to the general rule, to see to the application of the purchase-money. If, indeed, he had notice that the vendor intended to commit a breach of trust, and was selling the estate for that purpose, he would by purchasing under such circumstances be concurring in the breach of trust, and thereby become responsible; *Watkins v. Cheek* (*p*); *Balfour v. Welland* (*q*); *Eland v. Eland* (*r*). But assuming that the facts relied upon in this case amounted to notice that the debts had been paid, yet as the executor had authority to sell not only for the payment of debts, but also for the purpose of distribution among the residuary legatees, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required. The case then comes to this, —if authority is given to sell for the payment of debts and legacies, and the purchaser knows that the debts are paid, is he bound to see to the application of the purchase-money? I apprehend not."

It further appears from the authorities, that the trustee's receipt will be a sufficient discharge where the

2ndly. Where
sale directed
for parties
under dis-
ability.

St. Leonards in *Stroughill v. Anstey*, 1 D. M. & G. 654; but the rule is established. All the cases will be found collected in the notes to *Elliot v. Merryman*, 1 Le. Ca. Eq.

(*p*) 2 Sim. & S. 199.

(*q*) 16 Ves. 151.

(*r*) 4 My. & C. 429.

trust is for *immediate sale* for the benefit of persons who, by reason of infancy, or absence from the country, or any other disability, cannot receive payment of their demands, or join in a receipt for the purchase-money. Here, from the nature of the case, the purchase-money must be paid to the trustees (*s*), it will therefore be presumed that the receipt of the trustees alone was intended to be a sufficient discharge (*t*).

3rdly. Where application of fund is discretionary.

The power of giving receipts will be also implied where there is a trust, not for payment of the purchase-money to certain persons, but for its application by the trustees in some mode requiring the exercise of their discretion—as where the fund is to be re-invested in the purchase of land, or in Government securities. It is here presumed that the author of the trust intended to confide its execution to the trustees alone, and not to the purchaser (*u*).

The following suggestions (although rendered less important by the late Act) may be fitly introduced here:—“Where a purchaser is bound to see the money applied according to the trust, and the trust is for pay-

(*s*) If, however, an estate be charged with a sum of money payable to an infant on his attaining full age, the purchaser will be bound to see the money duly paid; *Dickson v. Dickson*, 3 Bro. C. C. 19.

(*t*) *Balfour v. Welland*, 16 Ves. 151; *Sowarsby v. Lacy*, 4 Madd. 142; *Keon v. Magawley*, 1 Dr. & War. 401. Payment cannot be postponed; for a trustee, after completing a contract for sale, is not justified in allowing the purchaser to enter until payment be made of the purchase-money; 8 Price, 166.

(*u*) *Doran v. Wiltshire*, 3 Swan, 699; *Balfour v. Welland*; *Ford v. Ryan*, 4 Ir. Ch. Rep. 342.

ment of debts or legacies, he must see the money actually paid to the creditors or legatees. In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one ; or if the creditors or legatees are but few they may be made parties to the conveyance. Another mode by which the purchasers may be secured is an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges, and then the trustee can be made a party to the several conveyances. Sometimes a bill is filed for carrying the agreement into execution, when the purchase-money is of course directed to be paid into Court ; and this is the surest mode, because the money will not be paid out of Court without the knowledge of the purchaser" (*v*).

Much inconvenience having arisen from the unwillingness of the Court of Chancery to imply a power of giving valid receipts for purchase-money paid to trustees, and from the intricate state of the law on this point, attempts have been made from time to time by the legislature to endow trustees for sale with that power (*w*). At length the following clauses in recent acts were designed for the aid of trustees for sale, in newly created trusts :—

(*v*) Ld. St. L. Vend. & Purch.

(*w*) As before stated, a power which came into existence under one statute on the 1st January, 1845, was taken away by another statute as from 1st January, 1846.

Power of
sale for pay-
ment of
debts 22 & 23
Vict. c. 35.

By section 14 of stat. 22 & 23 Vict. c. 35, it is enacted, that where by a will coming into operation after the 13th August, 1859, a testator charges real estate with the payment of debts or any specific legacy or sum, and devises the estate so charged to trustees, and makes no provision for raising the debts, legacy, or sum, the devisees in trust may, notwithstanding any trusts actually declared by the testator, raise such debts, legacy, &c. by a sale of the property by public auction or private contract, or by a mortgage, or partly in one mode and partly in the other. Section 15 continues these powers to all persons taking the estate so charged by survivorship, descent, or devise; and sect. 17 declares that purchasers and mortgagees are not bound to inquire whether such powers have been duly and correctly exercised by the person or persons acting under them.

Section 23 of the same Act declares that payment to, and the receipt of, any person to whom purchase or mortgage money is payable upon any trust, shall effectually discharge the person paying the same from seeing to its application, unless the contrary be expressly declared by the instrument creating the trust. This enactment is believed to apply only to trusts created *since* 13th August, 1859, and payments of *purchase or mortgage money* to trustees appointed by very recent instruments will doubtless be rendered an easier process than formerly.

Lord Cranworth's Act (23 & 24 Vict. c. 145) has a more extensive operation. Sect. 29 enacts, that the

23 & 24 Vict.
c. 145, s. 29.

receipts in writing of any trustee for *any money* payable by reason of any trusts or powers shall be good discharges. The operation of this Act is expressly limited to trusts created since 28th August, 1860. As neither of the foregoing enactments (*x*) is retrospective, it will for many years be necessary to inquire into the power of trustees to give valid discharges for purchase-money.

On a leading principle to which it has before been necessary to refer, viz., that the interest of a trustee must not be allowed to conflict with his duty, it has long been established that a trustee for sale cannot himself become the purchaser of the property. No exception to, or evasion of, this rule is permitted. The trustee for sale is utterly disqualified from purchasing, either by private or public sale: either directly, or through the interposition of a third party. He cannot even purchase at a judicial sale, as for example, a public sale in the Master's Office under a decree directing a sale (*y*).

The Court has, however, power to authorize a purchase by a trustee, where it would be attended with great advantage to the estate (*z*).

The adequacy of the consideration will not be con-

Trustee for
sale not al-
lowed to
purchase the
trust estate;

(*x*) They will be found *in extenso* in the Appendix.

(*y*) The cases establishing these propositions are very numerous. They are collected in *Ld. St. L. V. & P.*; and in notes to *Fox v. Mackreth*, 1 Le. Ca. Eq. 3 ed. 137.

(*z*) *Wren v. Kirton*, 8 Ves. 502; *Campbell v. Walker*, 5 Ves. 678; 13 Ves. 601; *Farmer v. Dean*, 32 Beav. 327.

sidered by the Court, on an application to set aside a sale by trustees for sale to a trustee. It is considered that his fiduciary position gives him peculiar means of acquiring information as to the real value and capabilities of the estate. On general principles, therefore, he is forbidden to purchase, and without regard to the mere question of value (*a*).

On the same principle a trustee is also disqualified from taking a lease, which may be regarded as a partial sale of the trust estate (*b*). This disqualification, both as regards a sale or a lease, may be said to extend to solicitors, agents, receivers, and others who occupy the fiduciary relation (*c*).

Or to take a
lease of it.

Sale voidable
at the option
of *cestuique*
trust.

A purchase of the trust estate by a trustee is not actually void *ab initio*. It may be annulled on the application of the *cestuique trust*, or of any of the *cestuisque trust*, where there are several: They have, however, an option of holding the trustee to his purchase, if they prefer that course. The rule is to be understood as grounded on the fiduciary relation existing between the trustee and those beneficially interested

(*a*) *Ex parte Laeey*, 6 Ves. 625; *Ex parte Bennett*, 10 Ves. 393; *Randall v. Errington*, 10 Ves. 423, see p. 428. A trustee is also disabled from purchasing as the agent of a third party; *Ex parte Bennett*, 10 Ves. 393; *Coles v. Trecothick*, 9 Ves. 234.

(*b*) *Atty.-General v. Clarendon*, 17 Ves. 500; *Passingham v. Sherborn*, 9 Beav. 424.

(*c*) *Atkins v. Delmege*, 12 Ir. Eq. Rep. 1; see *In re Romayne*, 13 Ir. Ch. Rep. 444; *Molony v. Kernan*, 2 D. & W. 31; *Carter v. Palmer*, 8 Cl. & F. 657.

in the estate. Where, therefore, this relation has not in fact existed, or where having existed it has, on a clear understanding between the parties, been determined, the purchase may be upheld (*d*). Thus, where a person nominated as a trustee, but who never accepted the trust, or acted in that capacity, became purchaser of the estate, it was held that the sale could not be impeached (*e*). And also where the trusteeship was merely nominal, and no duties were annexed to it (*f*). And a trustee may be permitted by the Court to retain his purchase, if he can succeed in showing that all the persons beneficially interested, being free from legal disability, and fully informed of all the facts of the case, and of the rules of Equity, have promoted, or approved of, the sale to him, or have confirmed it by a long acquiescence (*g*).

Cestuisque trust who are not labouring under any disability, and are in a position to enforce their rights, are, however, expected to take proceedings to impeach the sale within a reasonable period; otherwise the Court will consider that they have acquiesced in the transaction. "But" (to use the words of Sir W. Grant) "to fix acquiescence on a party, it should unequivocally appear that he knew the fact upon which the supposed

Laches of cestuique trust may bar his right.

(*d*) *Downes v. Grazebrook*, 3 Mer. 208.

(*e*) *Stacey v. Elph*, 1 My. & K. 195; *Chambers v. Waters*, 3 Sim. 42.

(*f*) *Pooley v. Quilter*, 4 Drew. 189.

(*g*) *Coles v. Trecothick*, 9 Ves. 234; *Morse v. Royal*, 12 Ves. 355; *Roche v. O'Brien*, 1 Ball & B. 353.

acquiescence is founded, and to which it refers" (*h*), or in the language of Lord Cranworth—"When you speak of acquiescence, you must look at all the circumstances of the acquiescence" (*i*).

What conduct amounts to *laches*.

The Court will, therefore, determine in every case what are the limits of that "reasonable time," within which application must be made to annul the sale to a trustee. In so doing, the Court will take into account all the circumstances of the case: not merely the time at which the applicant first became acquainted with his rights, but also his position in life, and means of enforcing those rights (*k*). No definite period has been fixed, after which the Court will refuse to set aside a sale on the ground of *laches* in the *cestuique trust*. In one case where a sale to an agent was set aside, yet, as sixteen years had elapsed, the Court refused to relieve the owner of the estate against an agreement to settle the estate, executed by the purchaser (*l*). Relief has also been refused when eighteen years had been permitted to elapse, before the application to annul the sale (*m*). A sale to a trustee has,

(*h*) In *Randall v. Errington*, 10 Ves. 423.

(*i*) In *Burrows v. Walls*, 5 D. M. & G. 233; 3 Eq. R. 960. The cases are collected in the notes to *Fox v. Mackreth*, 1 Le. Ca. Eq. (3rd ed.) 157; and in the notes to *Townley v. Sherborne*, 2 Le. Ca. Eq. (3rd cd.) 834.

(*k*) *Trevelyan v. Charter*, 11 Cl. & F. 714; *Roehe v. O'Brien*, 1 Ball & B. 342.

(*l*) *Purcell v. Kelly*, Beat. 492; and see *Roberts v. Tunstall*, 4 Ha. 257; *Baker v. Read*, 18 Beav. 398.

(*m*) *Gregory v. Gregory*, Coop. 201; *Champion v. Rigby*, 1 Russ. & M. 539; see *Baker v. Baker*, 18 Beav. 398; and cases

however, been set aside after an interval of ten years (*n*). It is apprehended that where the *cestui-que trust* has, without a good excuse, allowed *more* than ten years to elapse, he would, at the present day, find considerable difficulty in inducing the Court to annul the sale.

Where a numerous body of creditors are the parties beneficially interested, they are not expected to exercise that degree of vigilance that may be looked for in an individual; and are therefore allowed a somewhat longer time to take proceedings to annul the sale (*o*). Any confirmation by them should be the act of the whole number; as it has been decided that a majority of them has no power to bind the minority (*p*). The following expressions, made use of in a work of the highest authority, seem, however, to show that a final decision on this point is still required: "It is doubtful whether the purchase can be supported, unless all the creditors consent; although convenience, and the general rule of transactions by a body of persons, are strongly in favour of its validity where it is sanctioned by the great majority of the creditors" (*q*).

Where the
cestuisque
trust are
numerous.

referred to. For a recent instance of the claim against a trustee being barred by lapse of time and negligence, see *M'Donnell v. White*, 11 Ho. L. Cases, 570.

(*n*) *Hall v. Noyes*, cited 3 Ves. 748; see *Barwell v. Barwell*, 34 Beav. 371.

(*o*) *Whichcote v. Lawrence*, 3 Ves. 740; 6 Ves. 632; see 14 Ves. 446.

(*p*) *Colebrooke's case*, cited in *Ex parte Hughes*, 6 Ves. 622.

(*q*) *Ld. St. L. V. & P.* (edit. 1851) 547.

Terms of re-conveyance where sale is annulled.

After a sale has been set aside under the rule of Equity above referred to, the *cestuique trust* may insist on a reconveyance from the trustee; or from any person who has purchased from him with notice. The trustee is in this case entitled to receive repayment of his purchase-money, with interest at 4 per cent.; and all just allowances will be made to him for money expended on lasting improvements and repairs of the trust property, and in buildings and other additions of a substantial nature. There must, however, be an allowance made by him for any waste or deterioration of the estate while in his possession; and he will have to account for the rents and profits, or if in actual occupation, he will be charged with a fair occupation rent (r).

Terms of a re-sale of the estate.

In some cases the *cestuique trust* does not seek for a reconveyance of the specific estate, but prefers a *re-sale* under the direction of the Court. The terms of the re-sale under these circumstances have varied in several instances, but may now be regarded as uniform. The estate will be put up at a sum made up of the price at which the trustee purchased, with the addition of the value of lasting improvements made by him, making allowances for deterioration (as before). If any advance be made upon this aggregate amount, the re-sale will take place; otherwise the

(r) *Ex parte Bennett*, 10 Ves. 400; *York Buildings Co. v. Mackenzie*, 8 Bro. P. C. 42; *Dunbar v. Tredennick*, 2 Ball & B. 304; *Watson v. Toone*, 6 Madd. 153. See 1 Le. Ca. Eq. (3rd ed.) 156.

trustee will be held to his purchase (*s*). It has been held that when the trustee has purchased in one lot, the *cestuique trust* cannot insist on re-selling in several lots, except on the terms of first repaying to the trustee his purchase-money with interest and allowances (as before) (*t*). It was in the same case decided that the *cestuique trust* was not entitled to the benefit of a rise that had taken place in the funds in which the trustee's purchase-money had been invested (*u*).

Although a trustee for sale [the vendor] is not allowed to become the purchaser, the two characters being inconsistent, there is no rule prohibiting a purchase by a trustee from his *cestuique trust*. "The rule of the Court does not prevent an agent from purchasing from his principal, but only requires that he shall deal with him at arm's length, and after a full disclosure of all that he knows with respect to the property" (*x*). "A trustee may purchase from the *cestuique trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that

When a
trustee may
purchase
from his
cestuique
trust.

(*s*) *Ex parte Hughes*, 6 Ves. 617; *Lister v. Lister*, 6 Ves. 633.

(*t*) *Ex parte James*, 8 Ves. 351. This was a sale under the Court *pendente lite*.

(*u*) The costs of proceedings to set aside a sale, &c., will be considered hereafter, in CHAPTER X., COSTS OF TRUSTEES.

(*x*) Per Lord St. Leonards, in *Murphy v. O'Shea*, 2 Jo. & L. 425.

the *cestuique trust* intended the trustee should buy ; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee" (*y*). In scrutinizing a transaction of this kind the Court mainly regards the means of acquiring exclusive information possessed by the trustee, and the other circumstances under which the contract was made between him and his *cestuique trust* (*z*). To render such sale valid it must be known to the *cestuique trust* that he is dealing with his trustee : the latter will not be allowed to become the purchaser secretly, and in the name of another person (*a*).

Adequacy of
price.

The adequacy of the price given is also an element. If there have been any attempt to conceal the value, or to mislead by means of an insufficient valuation, there will be little difficulty in setting aside the sale ; and this applies not only to a trustee, but to an agent, a solicitor, or any person occupying a fiduciary rela-

(*y*) Per Lord Eldon, in *Coles v. Trecothick*, 9 Ves. 246-7. See *Tate v. Williamson*, L. R. 1 Eq. 528. A trustee for a person not *sui juris* cannot, of course, purchase at all without the sanction of the Court of Chancery : and that sanction will only be given under very extraordinary circumstances ; 5 Ves. 678 ; 13 Ves. 601 ; 1 Ball & B. 418.

(*z*) *Coles v. Trecothick*, 9 Ves. 234 ; *Morse v. Royal*, 12 Ves. 373. The same circumstances that will authorize a trustee, to contract for himself, will enable him to purchase as the agent of another. *Ld. St. L. V. & P.* (edit. 1851) 548.

(*a*) *Charter v. Trevelyan*, 11 Cl. & F. 714 ; *Ld. St. L. Ho. L.* 730.

tion; and in such case the *onus* of showing that the transaction was fair and straightforward, lies on the trustee or *quasi-trustee* (*b*).

In the administration of trusts of real estate, or of leaseholds, regard must be had to the claims of the Crown under the Succession Duty Act (*c*).

Liabilities
and powers
under the
Succession-
Duty Act.

Sect. 44 of that Act provides, that the following persons, besides the successor, shall be *personally accountable* for the duty payable in respect of any succession, but *to the extent only of the property or funds actually received or disposed of by them*; that is to say, every trustee, guardian, &c., in whom any property, or the management of any property, subject to such duty, shall be vested; and all such trustees, guardians, &c., may compound or pay in advance, or commute any duty, and retain out of the property subject to any such duty the amount thereof, or may raise such amount, and the expenses incident thereto, at interest, on the security of such property with power to give effectual discharges for the same, and such security shall have priority over any charge to incumbrance created by the successor; and in the event of the non-payment of such duty as aforesaid, every person thereby made accountable shall be a

(*b*) *Denton v. Donner*, 23 Beav. 285; *Smedley v. Varley*, 23 Beav. 358; *Luff v. Lord*, 34 Beav. 220; *Tate v. Williamson*, L. Rep., 1 Eq. 528; and see 13 Ir. Ch. Rep. 239, 250, and notes to *Fox v. Mackreth*, 1 Le Ca. Eq. (3rd ed), 143—152.

(*c*) 16 & 17 Vict. c. 51. Under sect. 19, leaseholds are not chargeable with legacy duty, but are “real property,” and, as such, liable to succession duty.

debtor to her Majesty in the amount of the unpaid duty for which he shall be so accountable.

Returns, &c.,
to be fur-
nished by
trustees, &c.,
under the
Act.

The trustees, or other persons by the Act made accountable for the payment of duty in respect of any succession, are, by sect. 45, required to give notice to the Commissioners of Inland Revenue, or their officers, as soon as any duty becomes payable by them as above, and at the same time a full return of the property, and its value; and if such return, &c., be unsatisfactory, the Commissioners may make their own estimate (subject to appeal). If any person, required to give any such notice or account as above, shall wilfully neglect to do so, he becomes liable (sect. 46) to heavy penalties. The Commissioners are empowered (by sect. 48) to enforce the delivery of accounts from executors, &c., and trustees of property, for the purposes of the Legacy Duty Acts, in the same manner as they are empowered to enforce the delivery of accounts for the purposes of this Act (*d*).

Trustees
may be
nominated
to receive
compensation
under Lands
Clausles Con-
solidation
Act.

The "Lands Clauses Consolidation Act, 1845," authorizes the special appointment of trustees to receive, within certain limits, money payable under that Act. Sect. 71 provides that when the fund shall not amount to £200 it may (either be paid into Court or may) be lawfully paid to *two trustees to be nominated*

(*d*) The amount of duties payable, mode of payment, &c., are fully considered in Williams on Exors. and Hanson on Succession Duties. The trustee is advised to comply with this enactment, although it is often disregarded.

by the parties entitled to the rents and profits of the land, such nomination to be in writing : and in case of coverture, infancy, lunacy, or other incapacity, such nomination may be made by the respective guardian, committee, &c. And the money so paid over is to be applied as directed by the Act, without any order of the Court being obtained (e).

It has been already stated that trustees of a residuary estate, including terminable leaseholds, are bound to convert the leaseholds into property of a permanent character, in order that *cestuisque trust* who have successive interests may enjoy the fund equally (f). It has also been stated that any intention of the settlor, expressed or implied, that no such conversion shall take place, will render it necessary for the trustee to leave leasehold or other depreciating property *in specie* (g).

For the covenants contained in the lease, the trustee will continue liable so long as he remains the legal owner of the term ; he resembles in this respect any

Duties of
trustees of
leaseholds.

Liability for
covenants.

(e) Land having been taken which was vested in several trustees under the Municipal Corporation Acts, the Court under this section ordered payment of dividends to *any two* of the trustees ; *Re Collin's Charity*, 29 L. J., Ch. 168. As to the extent to which a fund realized under this Act, remains impressed with the character of *realty*,—see *Re Stewart*, 1 Sm. & G. 32 ; 16 Jur. 1063 ; *Midland Railway Co. v. Osvin*, 1 Coll. 80 ; *East Lancashire Railway Co.*, 1 Sim., N. S. 260 ; *Re Manchester, &c., Railway Co.*, 19 Beav. 365.

(f) See page 134, *ante*.

(g) Page 135, *ante*.

other assignee of a leasehold interest (*h*). A trustee and executor who finds himself burdened with a lease under which there is no interest of value, should at once offer to surrender it to the landlord ; and if such offer be refused, it becomes his duty to take the course open to all assignees of chattel interests, of assigning to some third party. “An assignee, after such offer and notice to the landlord, is quite justified in so securing himself, doing as little injury to the landlord as possible ; and if a beneficial owner is justified in so doing, trustees for others are bound to do so” (*i*).

If the testator were not the original lessee, but only an assignee of the lease, the liability of his executor and trustee will be limited to such breaches of covenant as may have occurred in his own time ; all future liability may therefore be discharged by assignment over, even to a pauper (*k*). When the rent exceeds the annual value of the property, it becomes the duty of the executor to assign, and his neglect to do so will amount to a *devastavit* (*l*).

On assigning the lease, it has been usual for an

Indemnity on
assigning
lease.

(*h*) *Onslow v. Corrie*, 2 Mad. 330.

(*i*) Per Lord Cottenham, in *Rowley v. Adams*, 4 My. & C. 542. The liability of the *executor* of an original lessee is much more extensive, as the landlord may maintain an action against him, upon a covenant for payment of rent, although the lease may have been assigned in the life-time of the lessee, and the assignee of it may have been accepted as tenant ; Wms. Exors. 1585 (5th ed.).

(*k*) Wms. Exors. (5th ed.), 1585.

(*l*) *Rowley v. Adams*, 4 My. & C. 534.

executor and trustee to require an indemnity from the purchaser against the payment of rent and performance of the covenants; although the assignor is not himself bound to enter into any covenant, except the usual one that he has done no act to incumber (*m*). On assigning to his *cestuisque trust*, a trustee personally liable for the covenants has for a similar reason also insisted on an indemnity (*n*).

Where the estate is in course of administration by the Court, a sum of money has often been set aside as an indemnity fund (*o*). This will hardly be the usual practice in future, since the executors will, without providing for future accruing rents, be expressly indemnified by sect. 27 of stat. 22 & 23 Vict. c. 35, against the covenants for payment of rent in a lease (*p*).

Where renewable leaseholds form the subject of the trust, the trustees will be guided by the words of the will or settlement, both as to the obtaining of renewals, and as to the fund out of which the expense of so doing is to come. How far it is the duty of the trustees to take out renewals, where no directions are given for that purpose, has not been very clearly determined. It does not appear that the Court has ever held it to be

Lord St. Leonards' Act,
s. 27.

(*m*) Wms. Exors, 1585, n. The liability of executors in respect of leases is there fully considered.

(*n*) *Cochrane v. Robinson*, 11 Sim. 378; and cases there referred to.

(*o*) *Smith v. Smith*, 1 Drew. & Sm. 384.

(*p*) This enactment will be found in the Appendix.

obligatory on trustees to renew, where the instrument creating the trust has been absolutely silent on that point (*q*). Expressions that appeared to contemplate the taking out of renewals by the trustees have, however, been held to impose upon them an obligation so to do (*r*). Thus, where it was provided, "That it should be lawful for the trustees from time to time, as occasion should require, and as they should think proper," to renew, Sir J. Leach held that no discretion was given as to whether they should do so or not: they were appointed to protect future interests, and could not abandon them: the meaning was, that they might pay the expenses of renewing out of the rents and profits, as against the party in possession (*s*).

Trustees of a
marriage
settlement
bound to
renew.

Trustees of a marriage settlement which includes renewable leaseholds are, it seems, bound irrespective of the late Act, to keep the interest in existence for the benefit of the parties entitled,—although no direction to renew be contained in the settlement. Sir W. Grant, on this point, observed, that when a lease was made the subject of a settlement, it was clearly meant that it should be kept on foot by renewals: the trustees were to apply so much of the rents and profits as would be necessary for that purpose: they were not in so many words directed to renew; but the means being given, and the purpose expressed, there could be no

(*q*) See *O'Ferrall v. O'Ferrall*, Ll. & G. (Ld. Plunket), 79.

(*r*) *Lock v. Lock*, 2 Vern. 666; *Hulkes v. Barrow*, Taml. 264.

(*s*) *Milsington v. Mulgrave*, 3 Mad. 491.

doubt that they were to apply those means to that purpose (*t*). To the same effect were the expressions made use of by Lord St. Leonards, in a case (*u*) where the lease had expired, and the right of renewal was forfeited by the neglect of the tenant for life and the trustees. The latter excused themselves on the ground of ignorance of the circumstances. His lordship said that it was their duty to have made full inquiry: they were bound to appropriate the rents in discharge of the trusts of the settlement, of which they were the responsible agents: they had allowed the tenant for life to receive the rents, *and neglected to perform the obligation of the settlement*, and they who were responsible for this *breach of trust* were now endeavouring to relieve themselves from that obligation. It was accordingly held that they had no equity to a renewal, as the right to it had been forfeited by their neglect (*v*).

A fine payable on the renewal of a lease at fixed and stated intervals, should be provided for by setting aside yearly a sum sufficient for that purpose (*w*). Where the fine becomes payable on an uncertain event (as on the fall of a life), considerable difficulty is frequently experienced in consequence of the unsatisfactory state of the authorities as to the fund out of which such fund should be paid. If any intention can be collected that

Fines on renewals: how to be raised.

(*t*) *Montford v. Cadogan*, 17 Ves. 488.

(*u*) *Townley v. Bond*, 4 Dr. & War. 240.

(*v*) Ib. 259, 260.

(*w*) *Shaftesbury v. Marlborough*, 2 My. & K. 121.

payment of the fines shall be made out of *annual* rents and profits, the trustees will not be justified in burdening the *corpus* of the estate with them. In the absence of such intention, where there is merely a direction to pay "out of rents and profits," it is not very clear whether (leaving out of the question the late Act) the trustees would be authorized, by mortgage or otherwise, to levy the amount out of the *corpus* of the estate (*x*).

Apportionment of renewal fines.

Where the payment has been made, and it becomes necessary to apportion it between the tenant for life and the remainder man—the mode of so doing can be ascertained by certain definite rules (*y*). On renewals for terms of years, as also on renewal of leases for lives, the proportions of the expense will be regulated by the benefit to be derived from the renewal by the tenant for life and the remainder man respectively (*z*).

Where a fund has been accumulated for the purpose of obtaining the renewal of a lease, and it is ultimately found impossible to procure the renewal, it seems that the tenant for life will be entitled to receive the accumulated fund (*a*).

(*x*) See *Stone v. Theed*, 2 Bro. C. C. 243; *Milles v. Milles*, 6 Ves. 761; *Allan v. Backhouse*, 2 Ves. & B. 72; *Grantley v. Garthwaite*, 6 Mad. 96; *Playters v. Abbott*, 2 My. & K. 97; *Shaftesbury v. Marlborough*, ib. 121; *Garmstone v. Gaunt*, 9 Jur. 78; *Huddlestone v. Whelpdale*, 9 Ha. 775; *Harris v. Harris*, 32 Beav. 333.

(*y*) *Nightingale v. Lawson*, 1 Bro. C. C. 440; *White v. White*, 4 Ves. 33; 9 Ves. 554; *Jones v. Jones*, 5 Ha. 440.

(*z*) *Lewin, Trusts*, 5th ed., Ch. XV.

(*a*) *Morris v. Hodges*, 27 Beav. 625.

By sect. 8 of a late Act (23 & 24 Vict. c. 145), trustees of leaseholds renewable by contract or custom are authorized, and, if so required by any person beneficially interested, *are bound*, to use their best endeavours to obtain a renewal on the accustomed and reasonable terms ; and they are authorized to do or concur in all the necessary acts for renewing. But this section is not to apply where, by the terms of the settlement or will, the tenant for life is entitled to enjoy the property without any obligation to renew the lease, or to contribute to the expense of renewing it.

Sect. 9 empowers the trustees to pay the expenses incident to such renewal out of the trust funds in their possession ; or, if necessary, to raise it by mortgage ; and no mortgagee advancing the money will be bound to see that the amount is actually required for the foregoing purpose.

It is still difficult to ascertain the mode in which funds should be raised for payment of renewal fines and expenses of renewal. The Court of Chancery, when a case of this kind comes before it, endeavours to collect from the terms of the instrument creating the trust, authority for raising the required amount by mortgage, and then apportioning the burden according to its own principles among the successive persons interested (a).

(a) See Lewin on Trnts (5th ed.), p. 299—307. Should the trustee be in doubt either as to his obligation to renew, or the particular fund out of which the expenses of renewing should

Trusts of
renewable
leaseholds ;
stat. 23 & 24
Vict. c. 145.

Trust will attach to any renewal or new lease obtained by the trustee.

On a leading principle, which has several times been adverted to, a trustee is not allowed to retain the benefit of any renewal or new lease of the trust estate obtained by him. On any such new lease or renewal, a constructive trust arises for the *cestuisque trust* (*a*). Even where a trustee in possession, after the expiration of the lease (which was not a renewable one) obtained a new lease in his own name, with a declaration that it was not for the benefit of his *cestuisque trust*, the House of Lords held that the *cestuisque trust* were entitled to the benefit of the new lease, and this notwithstanding that the landlord had publicly advertised that the property included in the lease was to be reset (*b*). Where a trustee obtains a new lease, comprising not only the lands in the original lease, but also additional lands, the trusts will attach to the former, but not to the latter (*c*). An assignee of the trustee,

be paid, the best course will be to obtain the opinion and directions of a judge of the Court of Chancery, under sect. 30 of stat. 22 & 23 Vict. c. 35. Under this sect. (which is considered, hereafter) the directions of the court may be applied for at a slight expense, without instituting any suit. In Ireland, questions of the kind referred to may be avoided by taking advantage of the Renewable Leasehold Conversion Act, 12 & 13 Vict. c. 105. Under this Act a grant in fee may be obtained, and fines, &c., commuted into a fixed annual rent.

(*a*) *Griffin v. Griffin*, 1 Sch. & L. 352; *Mulhallen v. Marum*, 3 D. & War. 317; all the cases are collected in the notes to *Keech v. Sandford*, 1 Le. Ca. Eq. (3rd ed.), 40.

(*b*) *Fitzgibbon v. Scanlan*, 1 Dow. 261; Sugd. H. of L. 555.

(*c*) *Acheson v. Fair*, 3 D. & War. 512.

even for valuable consideration, who has notice, express or implied, of the trust, will of course be bound by it ; but the case is otherwise with purchasers for valuable consideration *without notice* (*d*).

A trustee who has obtained a renewal may (unless the *cestuisque trust* have barred their right by neglect) be compelled to assign, free from incumbrances (except, perhaps, such under-leases as have been made *bonâ fide*, at fair rents) ; and he will also have to account for the mesne rents and profits, and for any fines that may have been received by him while in possession.

He will, however, have a claim for the expenses attendant on the renewal, and for the expenses of lasting improvements effected by him on the property ; and also he will be entitled to an indemnity against the covenants by which he has bound himself (*e*).

It has before been stated, that where the trusts are fully performed, the person in whom the entire beneficial interest is vested is entitled to a conveyance or assignment from his trustee (*f*). On the refusal of the trustee to convey or assign to his *cestuique trust*, or to such person as he may direct, recourse may be had to a Court of Equity to compel him so to do (*g*). Where

Beneficial
owner en-
titled to con-
veyance.

(*d*) *Blewett v. Millett*, 7 Bro. P. C. 367 ; *Eyre v. Dolphin*, 2 Ball & B. 290 ; *Nesbitt v. Tredennick*, 1 Ball & B. 46.

(*e*) See notes to *Keech v. Sandford*, 1 Le. Ca. Eq.

(*f*) Page 156, *ante*.

(*g*) *Jones v. Lewis*, 1 Cox, 199.

the refusal of the trustee proceeds from obstinacy or caprice, he will undoubtedly render himself liable to payment of all the costs occasioned by his misconduct (*h*). Where, however, his refusal to convey arises from uncertainty as to the legal rights of the *cestuique trust*, the Court, in making a decree, will consider how far the circumstances justify his refusal, and will make an order as to costs accordingly (*i*).

Where title
of *cestuique*
trust is not
clearly made
out.

In a case where the trust was a very old one, and the title of the *cestuisque trust* complicated, Lord Eldon said that it would be matter for consideration whether the trustees would not have a right, where there had been so much devolution of title, to have the title examined in the Court, instead of being required to acquiesce in an opinion which was not clothed with the sanction of judicial authority (*k*). It would appear from other and more recent authorities, that the Court, in making the decree, will take into consideration not so much the question, whether the trustee was rightly advised as to the title of the *cestuisque trust*, as whether, on the whole, the doubts suggested as to their title were fair and reasonable doubts (*l*). *Prima facie*, the plaintiff will be entitled to a decree with

(*h*) Per Sir J. Leach in *Taylor v. Glanville*, 3 Mad. 178; 3 Russ. 589. See Chapter X., Costs of Trustees.

(*i*) *Goodson v. Ellisson*, 3 Russ. 583, 589.

(*k*) Per Lord Eldon, in *Goodson v. Ellisson*, ib. 593.

(*l*) *Angier v. Stannard*, 3 My. & K. 566; *Poole v. Pass*, 1 Beav. 600; *Lyse v. Kingdon*, 1 Coll. 184.

costs against the trustee (*m*) : but it is open to the latter to show that reasonable objections existed to the title of the *cestuique trust*; and that, acting under the advice of counsel, he had refused to convey without the protection of the Court (*n*).

A trustee, although he may be bound to convey to the *cestuique trust*, or as the latter may direct, will be under no obligation to execute several conveyances of portions of the trust estate ; he may require to be devested of the estate at once (*o*). When the estate is sold in several lots or divisions, and the trustee, availing himself of his strict right, requires to be devested by a single conveyance, advantage may be taken of the Trustee Act Extension, under section 2 of which, orders of the Court may be obtained, vesting the lots in their respective purchasers (*p*).

A trustee cannot be required to convey by any other words or descriptions than those contained in the conveyance to him ; in this respect he resembles a mortgagee (*q*). Nor can he be compelled to enter into any covenant, except the usual one that he has done no act to incumber.

In framing a conveyance by a trustee, it was long "Grant."

Several conveyances cannot be required.

Conveyance by a trustee.

(*m*) *Willis v. Hiscox*, 3 My. & C. 202.

(*n*) *Angier v. Stannard* ; *Poole v. Pass* ; *Devey v. Thornton*, 9 Ha. 222 ; *Field v. Donoughmore*, 1 Dr. & War. 234.

(*o*) Per Lord Eldon, in *Goodson v. Ellisson*, 3 Russ. 594.

(*p*) 15 & 16 Vict. c. 55. See pages 50, 56, *ante*.

(*q*) *Goodson v. Ellisson*, 3 Russ. 594.

usual to omit the word "grant," under the idea that a warranty was implied in that word. It is now enacted [stat. 8 & 9 Vict. c. 106, sect. 4] that the word "give" or "grant" is not to imply any covenant in law.

A trustee of real estates may devise them by his will; and a general devise may pass them, even although there be other property of the testator to which the devise may be applicable (*r*). But the general words may be restrained in cases where the testator has shown by other expressions that he only intended to devise that in which he had a beneficial interest (*s*).

*Effect of de-
vise of trust
estates.*

The practice of introducing into wills a devise of estates held in trust, renders the case of *Cooke v. Crawford* (*t*) one of considerable importance to trustees of real estate. That case decides that the powers annexed to the trust cannot be exercised by devisees of the trust estate, unless there be words in the trust deed or will authorizing the exercise of such powers by the assigns of the original trustee, or by the person on whom the estate may happen to devolve. The principle of this decision has been recognized in some other cases (*u*), although the decision itself has been declared to be a most inconvenient one (*x*). It has

(*r*) *Braybroke v. Inskip*, 8 Ves. 425.

(*s*) *Braybroke Inskip*, and other cases referred to in Lewin *Trusts*, 5th ed. p. 184—187.

(*t*) 13 Sim. 91 (Shadwell, V.-C.).

(*u*) *Mortimer v. Ireland*, 6 Ha. 196; *Wilson v. Bennett*, 5 De G. & S. 475; *Ashton v. Wood*, 3 Sm. & Giff. 436.

(*x*) *Macdonald v. Walker*, 14 Beav. 556.

been suggested (in a treatise of the highest reputation), that if the doctrine above referred to be ultimately established, it may be necessary to introduce into every devise of trust estates an exception of whatever estates may happen to be vested in the trustee upon such trusts as a devisee cannot execute (*y*).

Another question of practical importance to trustees of real estates, arising out of the same case is, whether a devise of the trust estate to persons who are not authorized to exercise the trusts, constitutes *per se* a breach of trust? In that case the V.-C. expressed a strong opinion to the effect that the trustee ought not to have devised the estate: he ought to have permitted it to descend, for in so doing he would have acted in accordance with the devise to him (*z*): The Court, if urged so to do, would probably fix the trustee's estate with the costs of getting the legal estate out of the devisee under his will: There was no substantial distinction between a conveyance and a devise; and if one was unlawful, the other must be so also (*a*).

Whether a
devise by
trustee
amounts to a
breach of
trust.

A devise of trust estates by the trustee cannot, however, be regarded as a breach of trust, where the devisee is better able to carry out the trusts than the

(*y*) 1 Jarm. Wills (2nd ed.), 611.

(*z*) The original devise in this case was to three trustees upon trust that they, or the survivor of them, *or the heirs of such survivor*, should sell, give receipts, &c., 13 Sim. 91.

(*a*) See the judgment of V.-C. Wood in *Hall v. May*, 3 Kay & Joh. 585.

heir-at-law would be—as in the case of the heir being a minor, or under some other disability (b). It would appear, therefore, that all the circumstances of the case must be taken into account, before any conclusion can safely be arrived at as to whether a devise of estates held by him is properly made by a trustee.

(b) *Titley v. Wolstenholme*, 7 Beav. 435; and see *Wilson v. Bennett*, 5 De G. & Sm. 479; Lewin on Trusts (5th ed.), 187—190, and cases there cited.

CHAPTER VIII.

OF TRUSTEES FOR CHARITABLE OR RELIGIOUS PURPOSES.

IN carrying out a trust of a public, charitable, or religious nature, the trustee will be mainly guided by those principles and rules affecting all trustees, of which a summary has been presented in the preceding chapters. There are, however, rules of law and statutes peculiar to trusts of this nature, to which it is necessary briefly to refer.

The Court of Chancery is said to interfere with more readiness in public than in private trusts ; and it undoubtedly adopts wider rules of construction with regard to them. For example, where no object is expressed, although an intention to devote property to a charitable purpose appears, or where the object has been obscurely or insufficiently expressed, the trust will not fail, or revert to the donor's representatives : the Court will take upon itself to carry out the general intention through an application *cy près* of the property, and will, if necessary, assume the office of executor and trustee (*a*).

Again, as the persons to derive benefit from a cha-

(*a*) Lord Eldon in *Moggeridge v. Thackwell*, 7 Ves. 69; and in *Mills v. Farmer*, 1 Mer. 55, 94.

Rules pecu-
liar to trusts
for public or
charitable
purposes.

ritable or public trust are, as individuals, unknown, and may be expected to form a succession of indefinite extent, the limits of duration imposed by law on a private trust, are not here imposed.

*Secret trusts
for charities.*

In some instances the donor or testator is unwilling to specify the charitable or religious objects for which he is interested ; and he hands over, or devises, or bequeaths property to a relative or friend, on the understanding that it is to be applied in some particular way. Where property is so made over without any promise as to the mode of its application, and full liberty is expressly reserved to the donee as to its disposition, the donee may deal with it exactly as he chooses ; and he will not be regarded as a trustee merely because a hope or expectation has been expressed by the donor or testator, as to the application of the property in a particular way (*b*).

*When secret
trusts can be
enforced.*

Trusts for charitable and religious purposes are usually created, and should always be created, by express declaration (*c*). But a bequest may be made in terms which appear to confer a beneficial interest as well as the legal estate on the devisee, while at the same time there has been an understanding between the testator and the devisee that the latter should hold

(*b*) *Wheeler v. Smith*, 6 Jur. N. S., and cases there cited.

(*c*) A declaration of trust may be by parol ; *Grant v. Grant*, 34 Beav. 623, and cases there cited. "A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument." Lords Jnstices in *Keke-wich v. Manning*, 1 D. M. & G. 176 ; see also *Richardson v. Richardson*, L. R. 3 Eq. 686, and cases there cited.

upon a secret trust for a charity. In a case of this kind, the Court of Chancery will inquire, (1) whether the testator intended that the devisee should hold for a charitable purpose ; (2) whether the devisee induced the testator to suppose that it would be so applied. When these propositions can be established to the satisfaction of the Court, the devisee will be declared (the Statute of Frauds notwithstanding) to be a trustee (*d*). “In such a case, the Court does not violate the spirit of the statute, but for the same end, namely, prevention of fraud, it engrafts the trust on the devise, by admitting evidence which the statute would in terms exclude, in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it” (*e*).

Lands, and property savouring of the realty, cannot be legally conveyed on trusts for any charitable or religious object, unless the deed be attested by two witnesses, and enrolled in Chancery within six calendar months after the execution, pursuant to the stat. 9 Geo. 2, c. 36 (*f*), and the other acts known as the Mortmain Acts (*g*). Where there is an accumulation of the fund, or a sum arising from sale of part of the

Mortmain
Acts.

(*d*) *Wallgrave v. Tebbs*, 2 Kay & J. 313, 321; *Jones v. Badley*, L. R. 3 Eq. 635. See *Errata* *to 3rd App. 382*

(*e*) L. J. Turner in *Russell v. Jackson*, 10 Ha. 204.

(*f*) The several acts are as follows :—9 Geo. 2, c. 36; 9 Geo. 4, c. 85; 24 Vict. c. 9; 25 & 26 Vict. c. 17; 26 & 27 Vict. c. 106; 27 & 28 Vict. c. 13; 29 & 30 Vict. c. 57. See notes to *Corbyn v. French*, Tudor Le. Ca. Conv. 2nd ed. 456.

(*g*) Not extending to Ireland.

property, which it appears to the trustees desirable to invest in land, it is necessary that the provisions of the Mortmain Acts should be borne in mind (*h*).

Common law
as to chari-
ties.

By the common law the sovereign, as *parens patriæ*, has the general superintendence of charities; and the Attorney-General is the officer of the Crown charged with this duty. An information, at the relation of some person not necessarily interested in the charity, is the ancient mode of proceeding to correct the evils arising from the neglect or the mal-administration of charity property (*i*). An information may complain of fraudulent dealings with the estate, and suggest a scheme for its future management, and pray for the appointment of a new trustee, without being open to the objection of multifariousness (*k*).

Parish trusts.

Parish property, freehold or leasehold (but not copyhold) was, by stat. 59 Geo. 3, c. 12, vested in the churchwardens and overseers, as a *quasi corporation* (*l*).

Omitting particular mention of statutes obsolete or expired (*m*), it is sufficient to state that stat. 52 Geo.

(*h*) *Re Christ's Hospital*, 12 W. R. 669. See Lewin on Trusts, 5th edit. 78, 407.

(*i*) *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. R. 17, a leading case on charity trusts; and see Lewin on Trusts, 5th edit. 665.

(*k*) *Att.-Gen. v. Cradock*, 3 My. & Cr. 85.

(*l*) The decisions on this Act will be found in Lewin on Trusts, 5th edit. 400.

(*m*) The Charity Act of 43 Eliz. c. 4, is practically obsolete; and certain Acts of 58 Geo. 3, and 59 Geo. 3, for inquiring into charities, ceased to operate many years since.

3, c. 101, with which the honoured name of Sir S. Romilly is associated, was the first Act which provided an efficacious remedy for many of the abuses to which charitable trusts are especially liable. That Act provided that in case of breach of trust, any two persons (not mere strangers, but having some interest in the subject-matter) might petition the Court of Chancery ; on which would follow an inquiry into the grievance complained of, and relief according to the usage of the Court. Any application under this Act requires the sanction of the Attorney-General (*n*). The result of this legislation was the redress of many abuses, principally in case of the larger and more important public charities ; but in course of time it became apparent that the machinery of a suit in Chancery was hardly adapted to meet the consequences of neglect and peculation in the numerous smaller charities, several of which are to be found in almost every town in the kingdom.

In the year 1853, Parliament determined to form a public department, to which should be committed the special duty of supervising charities, and from which redress could, even in cases of trifling importance, be obtained, without any considerable sacrifice of time or money on the part of a complainant. Stat. 16 & 17 Vict. c. 137, empowered the Crown to appoint a permanent Board of three Charity Commissioners for England and Wales, assisted by a secretary, inspectors,

Sir Samuel
Romilly's
Act.

. (*n*) See Morgan, Ch. St. 4th edit. 98, n.

and other officers (*o*). These Commissioners have, under the powers of the Act, framed their own rules of procedure: and they have ample jurisdiction over all charitable endowments.

The Board may examine and inquire into the condition and management of charities (sect. 9), and may require trustees to render accounts and statements in relation thereto (sect. 10). An inspector under the authority of the Board may require any trustee to attend and give information, and produce documents, but no trustee can be compelled to travel more than ten miles from home in obedience to the precept of the Board (sect. 12). Any person giving false evidence will be guilty of a misdemeanor (sect. 13). And any person refusing to render accounts or information, is to be deemed guilty of contempt of Court (sect. 14).

Trustees can obtain the advice and direction of the Board.

The 16th sect. is of great importance to trustees. It provides that the Board shall receive applications for their advice, opinion, and directions, respecting the administration of any charity, or any dispute arising thereout. The advice, &c., will be given in writing, under seal; and every trustee acting upon it (and not guilty of fraud or misrepresentation) will be deemed to have acted in accordance with the trust.

Notice of legal proceedings must be given to the Board (sect. 17); and the Board may authorize legal proceedings (sect. 19); and certify cases to the Attorney-General (sect. 20). The Board may sanction

(*o*) The office is at No. 8, York Street, St. James's Square, S.W.

leases, the working of mines, or repairs or improvements; and for these purposes may authorize the trustees to raise money by mortgage (sect. 21); may remove schoolmasters of schools (sect. 22); may compromise claims on behalf of the charity (sect. 23); and under special circumstances may authorize sale or exchange of charity lands (sect. 24); or the redemption of rent-charges (sect. 25).

This Act also enables the Master of the Rolls and the Vice-Chancellors sitting in Chambers, to make orders as to appointing or removing trustees of charities where the gross income of the charity exceeds 30*l.*, in the same way as before the Act they could have done in a regular suit or upon petition (*p*). Where the income does not exceed 30*l.* the jurisdiction is conferred (by sect. 29) on the District Courts of Bankruptcy and the County Courts (*q*).

Consolidated Order, XLI. (2), directs that any application to a Judge in Chambers under sect. 28, shall be made by summons [form Sched., K. No. 1]. No order under this Act by the Judge at Chambers shall be subject to appeal, where the gross income of the

Practice under s. 28.

(*p*) Sect. 28, explained in *Re Davenport's Charity*, 4 D. M. & G. 840.

(*q*) Since extended to cases where the income does not exceed 50*l.* by 23 & 24 Vict. c. 136, s. 11. A number of trusts, including registered places of religious worship, are by sect. 62 exempted from the operation of this Act; but sect. 63 enables the exempted trusts to participate in the benefits of the Act, if it be desired by the trustees.

charity shall not exceed 100*l.* unless the judge who made the order shall certify that an appeal ought to be permitted (*r*).

Charitable
Trusts
Amendment
Acts.

The "Charitable Trusts Amendment Act," 1855 (18 & 19 Vict. c. 124), considerably extended the powers of the Charity Commissioners, and enabled them to require trustees and others, making any statement, to verify the same by oath, and to require trustees and others to attend before them or their inspector, to answer questions; but no trustee is obliged to travel more than *ten* miles from home in obedience to the requisition of the Commissioners (sects. 6, 7). In case of non-compliance, persons may be adjudged guilty of contempt of Court (sect. 9). Trustees of charities are bound to render to the Commissioners an annual account of the endowments of the charity, and of the application of those endowments (sect. 44). This Act contains many other provisions as to the administration of charities and charity funds (*s*).

A further Act, in 1860 (*t*) [to be read together with the two preceding Acts] recited that "increased and inexpensive facilities for the administration of endowed charities" were still required. It enlarged the powers of the Commissioners in some respects, and, in particular, it gave them the *same powers as to the ap-*

(*r*) See Morgan Ch. St. 4th edit. 598—599.

(*s*) All these acts will be found *in extenso*, in the volume edited by Messrs. Cooke & Harwood.

(*t*) 23 & 24 Vict. c. 136.

pointment of new trustees of charities, as are exercised by a Judge at Chambers, but the application must be made by a majority of the trustees (*u*).

It also gave the district Courts of Bankruptcy, and the County Courts, jurisdiction over charities of which the gross annual income should not exceed 50*l.* (*x*)

This Act further enables a majority of two-thirds of the trustees of any charity assembled at a meeting of their body duly constituted, and having power to determine on any sale, exchange, partition, mortgage, lease, or other disposition of any property of the charity, to pass the legal estate, for giving effect to such disposition (*y*).

In 1862 a short Act (*z*) established the jurisdiction of the Charity Commissioners, even where the charity had formed the subject of a suit in Chancery.

It has been stated that the Board of Charity Commissioners will receive applications by trustees for their opinion, advice and direction, respecting the charity; and that the opinion and directions of the Board given in writing under seal, will indemnify trustees against consequences, provided there has been no wilful misstatement or concealment in obtaining the direction (*a*). Applications to the Board must be made

Advice and
direction to
trustees of
charities.

(*u*) Sect. 2. Query, whether an order of the commissioners is liable to stamp duty?

(*x*) Sect. 11.

(*y*) Sect. 16.

(*z*) 25 & 26 Vict. c. 112.

(*a*) Sect. 16. The authority of the commissioners extends to

in writing by a trustee or some person interested in the matter, and must be on notice to all trustees or administrators of the charity, and to such other persons as the Board shall consider entitled to notice (*b*).

Roman
Catholic
charities.

Roman Catholic charities in England and Wales were for some years, by temporary Acts, excluded from the operation of the Charitable Trusts Acts (*c*) ; but in 1859 the exemption came to an end by effluxion of time. In 1860 an Act was passed (*d*), exclusively affecting Roman Catholic charities, the most important clause of which enacts that, in the absence of written evidence as to the intentions of the founders of these charities, *the usage of twenty years* shall be relied on.

Management
and fulfil-
ment of
Charity
trusts.

The result of the recent legislation referred to is, that the trustees of a charity are enabled, with slight expense and delay, to obtain on any question of difficulty arising in the discharge of their duties, the advice and direction of a competent authority. And as

charities founded and endowed in England and Wales, although the revenues are expended abroad. Query, whether it extends to charities founded abroad, if the revenues are expended in England or Wales ? See *In re Duncan Taylor's Trusts*, L. R. 2 Ch. 357 ; and see *Whicker v. Hume*, 4 Jur. N. S. 933 ; 7 H. of L. Cas. 124.

(*b*) *Minute of the Board*, 30 Nov. 1860. Forms of application, notice, etc., are printed and sold under the direction of the Board. The Acts, Rules, &c., have lately been edited by Messrs. Cooke and Harwood.

(*c*) 19 & 20 Vict. c. 76, and subsequent annual Acts up to 1858.

(*d*) 23 & 24 Vict. c. 134, limited to England and Wales.

the strict fulfilment of the original terms of a trust created in a former age is often found to be practically impossible, it is a great advantage to the trustee that the Commissioners are enabled authoritatively to sanction an improved mode of administering the fund. It may be added, that the Commissioners generally require the concurrence of the majority of the trustees before making any considerable change in the administration of a charity ; and that a case may be of such a contentious or doubtful character, that the Commissioners may decline to reconstruct the charity and may refer the matter to the Court of Chancery.

Where there is no deed or instrument forthcoming which expresses the original purpose, the usage of a long course of years will constitute presumptive evidence of the trusts ; but where the deed can be produced and is precise, any such presumption is thereby excluded (*f*).

If an endowment has been given for purposes of religious worship without further definition, the form of worship of the Anglican Church will be presumed to have been intended (*g*) : but where the declared object was the maintenance of any other specified kind of worship allowed by the law, the trustees are bound to give effect to the expressed wishes of the founders.

Absence of written evidence.

(*f*) *Att.-Gen. v. Gould*, 28 Beav. 485 ; 7 Jur. N. S. 485 ; *Att.-Gen. v. St. Cross Hospital*, 22 L. J. Ch. 793 ; 17 Beav. 435.

(*g*) *Re Ilminster School*, 2 De G. & J. 535 ; also H. of L. Cas. 495 ; *Att.-Gen. v. Clifton*, 32 Beav. 596.

Asylum
chapel not
allowed to be
turned into
a parish
church.

A recent case (*h*) well illustrates the strictness with which the Court requires adherence to the terms of a charitable trust. The private chapel of a charitable institution was at the instance of the persons interested, and with the approval of the bishop, conveyed to and accepted by the Church Building Commissioners, in supposed conformity with the Church Building Acts (58 Geo. 3, c. 45 ; 59 Geo. 3, c. 134 ; 3 Geo. 4, c. 72) ; and the building was then consecrated, and had a district assigned to it as a parish church by order in Council, and the chaplain became the first incumbent. It did not appear that any injury had been sustained by the inmates of the charity, and their rights to use the chapel had been reserved. Vice-Chancellor Stuart held, that a breach of trust had been committed, and that the conveyance should be set aside and a reconveyance made : he declared that the Commissioners had, in taking the conveyance, exceeded their authority, citing Lord Cottenham's statement of the law as to how far the Court will interfere with the acts of public functionaries :—“ So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this Court will not interfere ; . . . but if they are depart-

(*h*) *Att.-Gen. v. Bishop of Manchester*, L. R. 3 Eq. 436. It was ineffectually urged for the defendants that the 29th section of the third Act fixes a limitation of five years, after which all claims are barred. Moreover that a church cannot be *unconsecrated* ; and that after banns had been published in it, the Church ought not to be reconveyed and secularized.

ing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this Court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority”(i).

In all matters appertaining to the control and management of a charity estate, the trustee should be guided by the directions given by the founder or donor (k). In the absence of such directions, the trustee can with safety assume the powers of an absolute owner so far only as may be necessary for the fulfilment of the trust, or clearly for its advantage. In considering how far acts of ownership might be exercised, Lord Langdale said,—“It is certainly a strong proposition to lay down, that the trustees of a charity have the same powers which a prudent owner has with respect to his own property: there may perhaps be *dicta* which go almost to that extent, but I apprehend that much more is expected from trustees acting for a permanent charity, than can be expected from the ordinary prudence of a man in dealings between himself and other persons. A man acting for himself may indulge his own caprices, and consider what is convenient or agreeable to himself, as well as

How far
may trustee
exercise
control?

(i) 4 My. & Cr. 249.

(k) *Att.-Gen. v. Calvert*, 23 Beav. 248; *Ward v. Hipwell*, 3 Giff. 547; 8 Jur. N. S. 666; *Att.-Gen. v. Bishop of Manchester*, L. R. 3 Eq. 436.

what is strictly prudent. Trustees of a charity, within the limits of their authority, whatever they may be, should be guided only by a desire to promote the lasting interest of the charity” (*l*).

Original intention to be carried out if it can be ascertained.

In many instances, the original intention being sufficiently clear, trustees have taken on themselves to alter the application of the endowment, under the idea that some other method of applying it was more likely to benefit the public. The Court of Chancery has, on many occasions, stated that the original object of the trust ought to be strictly carried out, unless varied by competent authority. Thus trustees have no power whatever, even with the consent of a majority of the congregation, to divert the destination of the property, by introducing material changes in doctrine or discipline (*m*) ; and no length of usage will warrant a deviation from the terms of an express trust (*n*). “ Cotemporaneous usage is a strong ground for the interpretation of doubtful words or expressions, but time affords no sanction to established breaches of trust” (*o*).

(*l*) Lord Langdale in *Att.-Gen. v. Kerr*, 2 Beav. 428.

(*m*) *Att.-Gen. v. Brandreth*, 1 Y. & C. Ch. 200 ; *Milligan v. Mitchell*, 3 My. & Cr. 72 ; *Att.-Gen. v. Vivian*, 1 Russ. 226—237 ; *Att.-Gen. v. Kell*, 2 Beav. 575 ; *Att.-Gen. v. Blizzard*, 21 Beav. 233. For an instance, however, of a change of usage on the part of a minister and the majority of the congregation, being in effect sanctioned by the Court, see *Att.-Gen. v. Gould*, 30 L. J. Ch. 77.

(*n*) *Att.-Gen. v. St. Cross Hospital*, 22 L. J. Ch. 793 ; 17 Beav. 435 ; *Att.-Gen. v. Rochester*, 5 De G. M. & G. 797.

(*o*) Lord Cottenham, 2 H. of L. Cas. 861.

With regard to nonconformist places of worship (*p*), questions of considerable difficulty have arisen, as well from the want of evidence as to the original destination of the endowment, as from the gradual change which is apt to take place in doctrine and discipline where no written standards have been established. It is well known that many congregations of dissenters were formed in the 17th century and early in the 18th century, originally holding opinions directly opposite to those entertained by their successors in later times. Where there is uncertainty as to the kind of doctrine intended to be taught by the founders of the chapel, the Court of Chancery will, in the absence of documentary evidence, inquire what has been the usage of the congregation: and, in order to put an end to much threatened litigation, an Act was passed in 1844 by which, in the absence of clear evidence, the usage of twenty-five years is on this point rendered conclusive (*q*). With regard to Roman Catholic charities in England and Wales, the usage of twenty years is, in the absence of documentary evidence, rendered conclusive by a more recent Act (*r*).

If the original purpose be clear, it is not competent for the trustees or the congregation to say, "We have altered our opinions, and the chapel in future shall be

Trusts of
chapels as-
certained by
usage in the
absence of
evidence.

Change of
opinions.

(*p*) These are exempted from church rates, poor rates, etc., by 3 & 4 Will. 4, c. 30.

(*q*) 7 & 8 Vict. c. 45, s. 2; see *Att.-Gen. v. Hutton*, Drury, 530.

(*r*) 23 & 24 Vict. c. 134, s. 5.

used by persons of our present persuasion” (*s*). Where a trustee of a chapel changes his religious views, and entertains opinions widely differing from those of the congregation, and does not retire voluntarily, he may be removed from the trust; and if costs are occasioned by his obstinacy and misconduct, it is most likely that the Court of Chancery will order him to pay them. But the Charity Commissioners cannot by their order remove any trustee from his office on the ground only of his religious belief (*t*). Where a chapel was many years ago built by subscription, and it was clearly shown that about the same time that it was built a written declaration of trust was made, the Court of Chancery decided that the wish of the contributors must be assumed to have been thereby expressed, and the Court, therefore, prevented the now existing trustees from acting otherwise than in accordance with the terms of that document (*u*).

A power of making by-laws or regulations will not

(*s*) *Att.-Gen. v. Murdoch*, 7 Ha. 445; *Att.-Gen. v. Munro*, 2 De G. & Sm. 122; *Att.-Gen. v. Aust*, 13 L. T. N. S. 235; *Newsome v. Flowers*, 30 Beav. 461.

(*t*) Charitable Trusts Act, 23 & 24 Vict. c. 136, s. 4.

(*u*) *Att.-Gen. v. Clapham*, 4 D. M. & G. 626. This case, *Doe d. Williams v. Lloyd*, 1 M. & Gr. 671, and *Dr. Warren's case*, reported in *Grindrod's Compendium*, are the principal cases relating to Wesleyan trusts, which trusts, however, in all new, and in most of the older instances, are defined by a trust deed which refers to and incorporates the terms of a standard or “model” deed. The latter is enrolled in Chancery, and it is express as to the paramount authority over all such trusts of the “Conference,” or governing body.

justify trustees in making any regulations of a kind inconsistent with the terms of their trust. In short, the original purpose must in every case be carried out, unless varied by competent legal authority. The Court of Chancery itself has no power to divert the application of the property—thus where a school was established for teaching on the principles of the Church, and it became highly expedient to admit Dissenters, the Court directed an application to Parliament for the purpose (*x*).

The trustees of a chapel have, in many instances, the *legal* right summarily to eject their minister (*y*) ; among the Independents or Congregationalists, this may be said to be the rule ; but where there is a question which must be judicially decided, the Court of Chancery will interpose, and, on the ground that it is of the first importance that the service shall be performed, the Court will allow the minister to officiate, and to receive his usual salary, *until* the question between him and the trustees can be properly decided (*z*). Where trustees have authority to remove the minister “in their discretion,” that discretion must be exercised

Removal of minister.

(*x*) *Att.-Gen. v. Market Bosworth School*, 35 Beav. 305 ; a private act was accordingly obtained in 1866.

(*y*) *Perry v. Shipway*, 1 Giff. 10 ; and see *Brown v. Dawson*, 12 Ad. & Ell. 624.

(*z*) *Foley v. Wontner*, 2 Jac. & W. 247. In the case of *Daugars v. Rivaz*, 28 Beav. 233 ; 29 L. J. Ch. 685, a minister who had been dismissed without sufficient cause, by trustees who had no absolute right of dismissal, was reinstated by the Court.

in accordance with the trust, and the Court will see that it is properly exercised (*a*).

Where the trust deed provides that notice of meeting shall be given to the trustees, of course a meeting held without notice given in the manner prescribed, will be illegal. But the House of Lords decided that where a Private Act defined a trustee to be one "acting by virtue of this Act," the omission to give notice to a trustee who had *not* acted as such, did not invalidate the resolutions of the meeting (*b*). It is a firmly established rule that a meeting, which has been duly convened by notice, may be adjourned to a subsequent day without further notice being given (*c*).

By an Act passed in 1850 (13 & 14 Vict. c. 28), relating to trustees of religious congregations or societies, it was enacted, that property held by trustees for charitable, religious and educational purposes, as therein specified, shall vest in their successors in office ; and that the evidence of the choice and appointment of new trustees may be preserved by means of a deed under the hand and seal of the chairman of the meeting at which new trustees shall be appointed, and executed in the presence of the meeting. This Act also provides for the commutation of fines and heriots on death or alienation, where the property is held by copyhold or customary tenure, for a payment to be

(*a*) *Wilks v. Childe*, 20 L. J. 113.

(*b*) *Kerr v. Wilkie*, 6 Jur. N. S. 383.

(*c*) *Scadding v. Lorant*, 3 H. of L. Cas. 418; *Kerr v. Wilkie, supra*.

made every forty years (*d*). The schedule to this Act contains a brief form of appointment of new trustees.

Where neither Peto's Act, nor the Charitable Trusts Act apply, it may become necessary to have recourse to the Court of Chancery for the appointment of new trustees. Petitions for this purpose should be entitled in the matter of 52 Geo. 3, c. 101, as well as in the matter of the Trustee Act, 1850; and the Attorney-General's fiat should be obtained (*e*). In selecting trustees of a charity, the question is whether the persons proposed are proper to be appointed, not whether they are the most proper (*f*). Property was, in the 16th century, given in trust to appoint a schoolmaster to instruct in "godly learning," and for other pur-

Appointment
and removal
of trustees of
charities.

(*d*) Sect. 2. This Act (which extends to Ireland) is little used for the following reasons: It clearly does not apply to a large class of cases, where the power of appointing exists, but is from absence or other cause difficult of exercise; and it is doubtful whether it applies in some other cases; and as the expense of a deed is necessary, it is usually considered more advisable to have the deed in customary form. Instead of making use of this Act, it is found to be more convenient and less expensive in the case of a place of religious worship or other trust exempted by sect. 62 of the Charitable Trusts Act, for the majority of a body of trustees to apply under the *permissive* clause of that Act (sect. 63) to the Board, for the purpose of obtaining an appointment of new trustees under the 2nd section of the Act of 1860, as above stated.

(*e*) *In re Rolle's Charity*, 3 De G. M. & G. 153; *In re Bierton Charity*, 10 Ha. App. 28, 37.

(*f*) *In re Lancaster Charities*, 7 Jur. N. S. 596; 9 W. R. 192.

**Eligibility
of trustees.**

poses ; and the question came before Lord Romilly, M. R., whether Dissenters were eligible as trustees, and he decided it in the affirmative ; but the Lords Justices held otherwise, on the ground that the instruction to be given was to be that in accordance with the doctrines of the Established Church ; and this decision was affirmed on appeal to the House of Lords (*g*). Although a trustee of a religious edifice may be incapacitated for continuance in office by a total change in his religious beliefs, it does not follow that his merely ceasing to sympathize with the particular sect which uses the edifice will justify his removal (*h*). Where laud had been given for the repairs of a church, and the rent had been applied by the churchwardens, a county court judge, on an application to him, appointed the surveyor and parish overseers to act as trustees together with the churchwardens. On appeal by the rector, he and the churchwardens *only* were appointed trustees (*i*).

Where the Court had arrived at the determination that a parish school was a Church of England school, it was held further that the trustees ought to be members of the Church, but that the school was open to children of all denominations (*k*). And in the same

(*g*) *Baker v. Lee, In re Ilminster School*, 8 H. of L. Cas. 495 ; 7 Jur. N. S. 1. As to the disqualification of persons who are not "*inhabitants*," to be trustees, see 32 Beav. 596 ; 33 Beav. 621.

(*h*) *Att.-Gen. v. Clapham*, 4 De G. M. & G. see p. 632.

(*i*) *In re Donington*, 6 Jur. N. S. 290 ; 8 W. R. 301.

(*k*) *Att.-Gen. v. Clifton*, 9 Jur. N. S. 939 ; 32 Beav. 596.

case it was held that although a person had been improperly appointed a trustee, yet it did not follow that the Court would remove him.

Numerous schools throughout the kingdom were founded and endowed in former times, for the express purpose of teaching "grammar" [i.e. Latin and Greek]. It has been held by several judges of the highest eminence, that the Court may extend the application of the charity fund to the teaching of other useful branches of education. And power to extend it has been expressly given by stat. 3 & 4 Vict. c. 77 (Grammar Schools' Act); but other branches must not be taught to the utter exclusion of Latin and Greek (*l*). Grammar schools are *exempted* from the operation of sect. 14 of the Charitable Trusts Act 1860, which enables trustees to remove the masters and mistresses of schools. The same Act (sect. 21) provides, that all applications to the Court of Chancery under the Act may be brought forward on petition only, such petition to be presented, heard, and determined as if under Romilly's Act.

Trustees of charitable and religious foundations are not bound to unanimity in their decisions, as are ordinary trustees. The decision of the majority of them will usually bind the minority (*m*); but the act of the

Other cases in which the religious instruction to be given in schools has been considered, are *Att.-Gen. v. Sherborne*, 15 Beav. 256; *Chelmsford School Case*, 1 Kay & J. 543; *Att.-Gen. v. Haberdashers' Company*, 19 Beav. 385; *Att.-Gen. v. Calvert*, 23 Beav. 248; *In re Stafford Charities*, 25 Beav. 28; 27 L. J. Ch. 381.

Grammar schools.

Removal of school-masters.

Unanimity not required of charity trustees.

(*l*) *Berkhampstead School Case*, L. R. 1 Eq. 102.

(*m*) *Perry v. Shipway*, 1 Giff. 1; *Att.-Gen. v. Cuming*, 2

majority does not bind the minority in matters *beyond* the sphere of their duty (*n*). The Court, in appointing a numerous body of trustees, is willing to insert a proviso that a certain proportion of them shall form a quorum. It was lately enacted, that a majority of two-thirds of the trustees of any charity, assembled at a meeting duly formed, and having power to determine on any sale, exchange, partition, mortgage, lease, or other disposition of any property of the charity, are empowered to pass the legal estate for giving effect to such disposition (*o*).

Application
of accretion
of charity
property.

In numberless instances the charity property has increased in value so much as to be more than sufficient for the objects defined by the founder of the trust. The rule of law in such cases is that the accretion is *prima facie* to be applied and apportioned *pro rata* among the objects of the founder's bounty, but subject to the discretion of the Court (*p*). It is impossible to specify to what extent or under what circumstances, the Court

Y. & C. Ch. 139. In some other points, also, the strictness of law has been relaxed in their favour. Where they are directed to do a certain thing within a limited time, a delay of more than the time specified will not invalidate their act. Again, where trustees are directed to fill up vacancies, when reduced to a certain number, they are allowed to fill them up even when they are reduced to a much smaller number. In fact, in trusts of a public nature, some latitude of construction is allowed; for if strictness were exercised it is probable that trusts of this kind would be abandoned to their fate.

(*n*) *Ward v. Hipwell*, 3 Giff. 547.

(*o*) 23 & 24 Vict. c. 136, s. 16.

(*p*) *Lord Kingsdown in Att.-Gen. v. Dean, &c., of Windsor*, 8 H. of L. Cas. 452.

will exercise its discretion of varying the proportions : but supposing that some of the objects have ceased to exist, or supposing that the founder's direction with regard to other objects, if carried out in these days, so far from being beneficial, would prove detrimental,—in either of such cases a good reason would exist for exercising the discretion, and applying the accretion for the benefit of one class of objects, and withholding it from another (*q*). This is not, however, a discretion which trustees can be advised to take on themselves. Their proper course, where the income of the charity is found to be excessive, is to obtain the directions of the Charity Commissioners ; and, if necessary, those of the Court of Chancery.

Trustees for charitable purposes have, generally speaking, no power to sell the property of the charity, or to grant leases for long terms of years (*r*) ; and they cannot be advised to attempt any sale, or to grant any lease of unusual duration, without the sanction of the Charity Commissioners, who, under the recent Acts, have full powers as regards the sale, exchange, or mortgage of charity estates (*s*). The funds to arise from the sale, &c. may be invested or applied in such manner as the Commissioners may think beneficial, and as is not inconsistent with the foundation (*t*). It will

Sales and
leases of
charity
lands.

(*q*) *Att.-Gen. v. Marchant*, L. R. 3 Eq. 424, see 430.

(*r*) As to the duration of leases to be granted by charity trustees, see *Att.-Gen. v. Hall*, 16 Beav. 388; *In re Cross*, 27 Beav. 592.

(*s*) 16 & 17 Vict. c. 137, s. 24 ; 18 & 19 Vict. c. 124, s. 32.

(*t*) 23 & 24 Vict. c. 136, s. 15.

Trustee not
to be lessee.

be prudent, therefore, for the trustees to obtain the sanction of the Commissioners before entering into any contract for sale. In granting leases of charity lands the trustees should not accept one of their own number as lessee, if any responsible stranger can be procured as tenant (*u*) ; nor should a lease be made to any near relation or connexion of a trustee, if it can be avoided. A charity trustee must not place himself in a position where his duty and his interest will conflict. Where a charity scheme provided that no trustee should occupy any portion of the charity property, and one of the trustees took a lease of a portion of it (by tender), it was held by the Court that he was bound to give up either the lease or the trusteeship (*x*). Care should also be taken in granting a lease that an adequate consideration for the lease in the way of rent and fine, or of rent only, be obtained, otherwise the transaction is liable to be set aside by the Court, and the loss may be directed to be borne by the trustees, or the tenant, according to circumstances (*y*). Under the late Act, the Commissioners are empowered to authorize the grant by charity trustees of building, repairing, improving, mining or other leases (*z*), and the trustees are restricted from granting without the sanction of the Board "any lease in reversion after more than three years of any

(*u*) *Att.-Gen. v. Clarendon*, 17 Ves. 491, see 500.

(*x*) *Foord v. Baker*, 27 Beav. 193.

(*y*) See *Ferraby v. Hobson*, 2 Phill. 255, and see Duke, pp. 43, 46, 67, 116.

(*z*) 16 & 17 Vict. c. 137, ss. 21, 26.

existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years (*a*).

The Secretary of the Board of Charity Commissioners, together with such persons as the Lord Chancellor may, from time to time, associate with him, are styled "official trustees," and in them any charity estates or funds may be vested. They have an account open in the Bank of England, to which account charity funds may be paid in, or trustees may transfer Government stock into their names (*b*). The "official trustees" are required to lay an abstract of their accounts before Parliament annually (*c*). If a trustee of a charity should find in his possession a fund which he does not know how to apply, his best course will be to lodge it to the credit of the official trustees of the Board; or if the amount be small he may lodge it in the county court.

In concluding this part of the subject, it may be remarked that the Board of Charity Commissioners has no jurisdiction whatever over the universities or their

Official
trustees of
charities.

Exceptions
from Charita-
ble Trusts
Acts.

(*a*) 18 & 19 Vict. c. 124, s. 29. The principle on which leases of charity lands should be granted has lately been considered by the Court of Chancery Appeal, in a case in which leases at low rents in consideration of fines had long been granted by custom, and had also been sanctioned by a scheme settled by the award and decree of the Court. It appears that the Court will only approve of leases being made at a full rent; *Att.-Gen. v. St. John's Hospital*, L. R. 1 Ch. App. 92.

(*b*) 18 & 19 Vict. c. 124, ss. 15, 17, 20.

(*c*) 23 & 24 Vict. c. 136, s. 18.

colleges, or over registered places for religious worship or over the various charitable and religious institutions, and societies, which are maintained by voluntary contributions, and are not endowed (*d*). But the exempted charities and institutions may, by petition, signed by the majority of the trustees, apply to the Board to have the benefit of the Act generally, or of any of its provisions (sect. 63). Roman Catholic charities were also exempted, but in 1859 this exemption ceased, and they are now within the operation of the Charitable Trust Acts.

Irish acts
relating to
charity
trusts.

Charitable trusts in Ireland were, to a certain extent, placed under the jurisdiction of a "Board of Charitable Donations and Bequests" (*e*), by stat. 7 & 8 Vict. c. 97. A recent Act, 30 & 31 Vict. c. 54, enlarges the powers of the Board, as follows:—The Board may now receive and consider applications by trustees of charities, for advice and directions which will be given in writing; and every trustee acting thereon (without having been guilty of any fraud or concealment) shall be deemed to have acted properly, and shall be indemnified.

The Board may sanction the compromise of claims; and may, in certain cases, join the trustee in a petition

(*d*) 16 & 17 Vict. c. 137, s. 62; 18 & 19 Vict. c. 124, s. 47; see *Governors for Relief, &c. v. Sutton*, 27 Beav. 651.

(*e*) Consisting of judges, ex-judges, and other commissioners (unpaid) appointed by the crown, assisted by two joint-secretaries, one of whom is especially concerned with Roman Catholic charities. The office is at 2, Kildare Place, Dublin.

to the Court of Chancery, proposing a scheme for administering the trust. Trustees may lodge trust money, or stock held for charitable purposes, with the Board; and may also deposit deeds and documents. The consent of the Board is necessary before trustees can make a change of investment of charity funds. The Board may sanction leases, sales, and exchanges of charity lands.

There is no power, however, (as under the English Acts) to compel trustees to furnish accounts, or to give information to the Board.

CHAPTER IX.

JUDICIAL ADVICE TO TRUSTEES.

Advice of an
equity judge
may be ob-
tained.

TRUSTEES are now enabled, without the delay and expense of a suit in Chancery, to obtain the directions of the Court, on points of doubt and difficulty in relation to the investment or management of trust property.

Sect. 30 of 22 & 23 Vict. c. 35 (Lord St. Leonards' Act) enables any trustee (*a*), or executor to apply by petition, or by summons upon a written statement, to any judge of the Court of Chancery, for the opinion, advice, or direction, of such judge on any question respecting the management or administration of the trust property or the assets of any testator—on notice, however, to all persons interested. And the trustee, or executor, acting upon such opinion, advice or direction, shall be deemed, so far as regards his own responsibility, to have discharged his duty, provided

(*a*) The enactment is retrospective in its operation (*In re Simpson*, 1 J. & Hem. 89). Although in its terms general, it would not be regular for a trustee of a charity to apply under this Act, inasmuch as the Board of Charity Commissioners (in Ireland the Board of Charitable Donations) can give directions to the trustee—see Chapter VIII.

that there have been no fraud or wilful concealment or misrepresentation on the part of the trustee. The costs of the application are in the discretion of the judge.

By a further enactment (23 & 24 Vict. c. 38, s. 9), every such petition or statement shall be signed by counsel ; and the judge may require the attendance of counsel, if he deems it necessary, either in Court or Chambers.

The practice under this Act is regulated by an Order of Court of 20th March, 1860(*b*), which directs that all petitions, statements, &c., shall be intituled "In the matter of the said Act and In the matter of the particular trust, will, &c." and shall state the facts concisely and in paragraphs ; and shall, except as to title, be in the form of the general summons in Schedule K, No. I., Cons. Ord. When the summons is sealed, the statement must be left at the Judge's Chambers. Seven clear days' notice must be given, unless the person served consent to a shorter time. The "Judicial Advice," or "Judicial Direction," is to be entered of record (being so termed) with the other orders of the Court.

As the Court proceeds on an *ex parte* statement unsupported by evidence, it is necessary that the strictest accuracy should be observed in drawing it up, otherwise the trustee may not be indemnified by the direction of the judge given upon it. The state-

(*b*) Morgan, Chan. Stats. &c. 4th edit. p. 618.

ment should embody all the information material for enabling the Court to give its opinion, without referring to affidavits (*c*). But this procedure is not adapted for obtaining a decision upon an intricate case, or for obtaining the sanction of the Court to a large expenditure in improving a settled estate; or for a case involving points of law requiring argument, or involving disputed facts as to which evidence would be necessary (*d*). The Act is only intended to afford to trustees the benefit of an authoritative direction as to points which may arise in the management of the property "where there is no suit and no contention" (*e*). And a trustee can apply alone, if his co-trustee declines to join him in the application (*f*).

Service of
parties in-
terested.

It is not necessary that the statement should be served on all persons interested in the trust fund; but if the trustee is really doubtful, as to who should be served, it may be allowable for him to apply beforehand, *in Chambers*, for the directions of the judge, as to the proper parties to be served (*f*). It is not, however, the practice to make a formal application to

(*c*) *Re Muggeridge*, 1 Joh. 625; 6 Jur. N. S. 192. For other decisions on this Act, see Morgan, Chan. Stats. 4th edit. 283.

(*d*) *Re Barrington*, 1 John. & Hem. 142; 8 W. R. 577; *Re Hooper*, 29 Beav. 656; *Re Evans*, 30 Beav. 232; *Re Dennis*, 5 Jur. N. S. 1388; *Re Pleasant's Asylum*, M. R. Ireland, 1867.

(*e*) *Re Lorenz*, 7 Jur. N. S. 402; *Re Box*, 1 Hem. & M. 552; *Re Dennis*, *supra*.

(*f*) *Re Muggeridge*, *supra*.

the Court on petition for directions on this point. The proper course is for the petitioner to serve such persons as he thinks proper, and to state at the end of his petition whom he has served (*g*).

The procedure under this Act may sometimes be adapted for the case of all parties consenting to accept the opinion of the judge on a doubtful point, where the facts are ascertained, instead of instituting a suit (*h*). Its chief utility will, however, be found in guarding the trustee from the danger to which an unauthorized investment or sale, or a questionable payment may subject him. It will enable him to take an absolutely safe course at once, instead of relying in a doubtful matter on opinions which will not (if erroneous) be of any protection to him, and then of obtaining, as is too commonly the case, the partial and unsatisfactory indemnity which the tenant for life of the fund is usually able to offer.

(*g*) *Re Green*, 6 Jur. N. S. 479, 530.

(*h*) *Re Mockett*, 1 Joh. 628; 6 Jur. N. S. 142; *Re Spiller* (Lord Justices), 6 Jur. N. S. 386; Morgan, Chan. Stats. 4th edit. 283.

CHAPTER X.

COSTS AND EXPENSES OF TRUSTEES.

Costs and expenses allowed out of the fund.

ALTHOUGH no provision be made in the deed or will creating the trust for the costs and expenses incident to its fulfilment, they may be charged by the trustee against the fund, and will be allowed on a settlement of his accounts. Every trustee is authorized, *by the nature of his office*, to reimburse himself all such charges and expenses (*a*). This rule is of course subject to the qualification, that the costs and expenses incurred by the trustee, and charged against the fund, must be such as are necessarily and *bond fide* incurred for the benefit of the trust estate.

A trustee will not be entitled to charge the fund with expenses unwisely and fruitlessly incurred; as for instance, the costs of preparing a useless and inoperative deed (*b*).

(*a*) Per Lord Eldon, in *Worrall v. Harford*, 8 Ves. 8. This principle is fully stated by Lord Cottenham in *Att.-Gen. v. Mayor of Norwich*, 2 My. & C. 424.

(*b*) *Smith v. Dresser*, L. R. 1 Eq. 651; and see *Att.-Gen. v. Earl Mansfield*, 2 Russ. 501, 518; *Elsey v. Cox*, 26 Beav. 95; but where a trust deed for benefit of creditors contained a first trust for payment of the costs of the deed, such costs were allowed to the trustees, although the solicitor had been employed not by them but by the debtor; *Re Sadd*, 34 Beav. 650.

The law as to reimbursement of trustees was declared, rather than altered, by sect. 31 of stat. 22 & 23 Vict. c. 35, which enacts that every instrument creating a trust either expressly or by implication, shall be deemed to contain a clause authorizing the trustee to reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of the trusts.

The expense attending a new appointment of trustees is often paid by the tenant for life, to avoid the inconvenience of selling or realizing a portion of the capital. Where the latter consists of real estate, or a mortgage, it would be difficult to arrange it otherwise. Still, the rule of the Court (which it is allowable to follow out of Court) is to charge such costs on the capital of the trust fund, and not on the income (*c*).

A trustee, when called upon to transfer the trust fund to a newly-appointed trustee, is not entitled to charge it with the expense of making an attested copy of the settlement, or to insist on having a duplicate copy of the new appointment handed over to him ; nor can he insist on charging the cost of obtaining counsel's opinion as to his right to such documents (*d*). Such costs would be considered as incurred for the satisfaction of the trustee himself, from an excess of caution on his part ; and cannot properly be regarded as ex-

Sect. 31 of
Lord St. Leo-
nards' Act.

Costs conse-
quent on a
change of
trustees.

(*c*) *Carter v. Sebright*, 26 Beav. 376 ; Lewin on Trusts, 5th edit. 475.

(*d*) *Warter v. Anderson*, 11 Ha. 301 ; 1 Eq. Rep. 266.

penses incurred in the administration of the trust estate (*e*).

Costs occasioned by refusal to convey.

Where the title of the *cestuique trust* is clearly made out, a trustee refusing, without sufficient excuse, to convey or make over the trust property, incurs the risk of being ordered to pay the costs of a suit occasioned by his refusal (*f*).

Disclaiming trustee.

A person named as trustee, but who has never accepted the trust and is unwilling to act, if made defendant in a suit, may appear in Court and disclaim; or he may disclaim by his answer—in which case the bill will be dismissed as against him with costs (as between party and party); and if his costs are unnecessarily heavy the Court may disallow part, by giving him only the costs of a simple disclaimer (*g*).

Costs can be claimed against the trustee alone;

As the trustee is entitled to retain the solicitor, and to charge the fund with the expense of so doing, it follows that the contract is between them alone, without reference to the parties beneficially interested in the fund. The trustee is, like any other client, per-

(*e*) If the trustee be a solicitor he will, on taxation, be allowed costs out of pocket only, and not the customary professional charges. *Gomley v. Wood*, 3 Jo. & Lat. 678; *York v. Brown*, 1 Coll. 260: the cases are collected in Morgan on Costs, 279.

(*f*) *Willis v. Hiscox*, 4 M. & Cr. 197; *Penfold v. Boucher*, 4 Ha. 271; *Holford v. Phipps*, 4 Beav. 475; *Smith v. Bolden*, 33 Beav. 262; *Palairet v. Carew*, 9 Jur. N. S. 426.

(*g*) See p. 18, *ante*; *Hickson v. Fitzgerald*, 1 Moll. 14; and see p. 146; *Norway v. Norway*, 2 My. & K. 278; *Mohun v. Mohun*, 1 Sw. 201; see also *Re Tryon*, 7 Beav. 496; *Benbow v. Davies*, 11 Beav. 369.

sonally liable to his solicitor ; and the latter, acting on the retainer of the trustee, has no claim whatever against the fund (*h*). Payment to his solicitor will be, therefore, upon the sole responsibility of the trustee.

"By the rule of this Court," said Lord St. Leonards (*i*), "if the trustee pay the solicitor's bill of costs without taxation, and then a demaud is made by him against the trust estate for the amount, the *cestuique trust* has a right to have the bill referred, *not for taxation, but to be moderated*, and upon that reference the Master will revise the items in a way similar to taxation ; and if, upon the reference, the charges appear not to be proper charges, they will be disallowed to the trustee, and he will be left to get back from the solicitor the sums which he has so paid to him in the best way he can : That was decided in *Johnson v. Telford* (*k*) ; and although costs have been paid by the trustee, and he has been allowed them in account by the *cestuique use* who has released, yet the *cestuique trust* will be allowed to make use of the name of the trustee to have the costs taxed, if the trustee can still tax them, giving him a proper indemnity" (*l*). Under the Solicitors' Act (6 & 7 Vict. c. 73, s. 39) *cestuisque trust* may, at the discretion of the Court, obtain an order to tax the

and may be
moderated
after pay-
ment.

(*h*) Per Lord Eldon, in *Worrall v. Harford*, quoted 4 D. & War. 109.

(*i*) In *Langford v. Mahony*, 4 D. & War. 81, 110.

(*k*) 3 Russ. 477.

(*l*) *Hazard v. Lane*, 3 Mer. 285.

costs of the trustee's solicitor (*m*). Where an agent or solicitor has, by mixing himself up in a breach of trust, or acting as though he were himself trustee, become a trustee by construction of law, in that case the *cestuique trust* may acquire the right of proceeding directly against him (*n*).

Costs of proceedings under Trustee Act.

By section 51 of the TRUSTEE ACT (*o*), it is provided that the Lord Chancellor (in lunacy), or the Court, may order the costs and expenses attending petitions, orders, and other proceedings under the Act, to be borne by the lands, or personal estate, or the rents or produce of them, as the Court may direct.

In ordinary cases, therefore, the costs of proceedings will be paid out of the fund forming the subject of a vesting order under the Act; and where the property consists of land, the costs of the petition, if not paid, will be declared a charge, and will carry interest at 4 per cent. until payment (*p*).

Costs of vesting order, &c.
Trustee Act.

Where the death of a vendor (after a contract for sale has been entered into, and before the completion of the sale), leaving an heir at law under disability, and unable to convey, renders an application necessary under

(*m*) For cases where taxation has been directed at the instance of the *cestuique trust*, see *Re Dickson*, 3 Jur. N. S. 29; *Re Dawson*, 28 Beav. 605.

(*n*) Lewin on Trusts, 5th edit. 455. As to how far a solicitor is liable to account to *cestuisque trust* for moneys coming into his hands in the progress of a suit, see *Harries v. Rees*, 17 L. T. Rep. N. S. 418.

(*o*) 13 & 14 Vict. c. 60; see APPENDIX.

(*p*) *In re Davies*, 16 Jur. 882.

this Act, the costs will also be payable out of the estate (*q*). If the trust estate be sold in lots, it is competent for the purchaser of one of them to obtain an order at the expense of the estate: which may therefore become liable to bear as many sets of costs as there are purchasers (*r*).

In proceedings under this Act, the Court will, however, exercise a discretion as to allowing costs; and if the misconduct of a trustee render the proceeding necessary, he may be ordered to pay all the costs occasioned by such misconduct (*s*).

In proceedings in Courts of Equity between trustees and their *cestuisque trust*, the costs of the trustee are usually allowed, unless the suit have been rendered necessary by misconduct on his part, or other special circumstances induce the Court to make a different order (*t*). In a suit against a trustee, if part of

Costs of suit given at the hearing.

(*q*) *Heard v. Cuthbert*, 1 Ir. Ch. R. 369; *Bradley v. Munton*, 16 Beav. 294.

(*r*) *Ayles v. Cox*, 17 Beav. 584.

(*s*) Other cases where costs of proceedings under this act have been considered, are *In re Primrose*, 23 Beav. 599; *Re Viall*, 8 D. M. & G. 439; *Re Biddle*, 22 L. T. 217; *Re Fellows*, 2 Jur. N. S. 62; *Re Giraud*, 9 Jur. N. S. 862; the cases are collected in Morgan on Costs, and Adair on Costs.

(*t*) As to the circumstances under which the trustee's costs may be disallowed, see pp. 276, 277. Costs of *rehearings* by the Lord Chancellor are not included in "costs of suit as between solicitor and client" (*Agabeg v. Hartwell*, 5 Beav. 271), but require to be specially mentioned. In *Prendergast v. Prendergast*, 3 H. of L. Cas. 195, 225, a trustee was held to be entitled to appear by counsel on the appeal, but not to print a case or appendix, and was disallowed the costs of so doing.

the bill fails and part succeeds, he may be ordered to pay an apportioned share only of the costs (*u*). When any part of the trust fund comes under the immediate control of the Court, the costs of the trustee will ordinarily be allowed, as between solicitor and client, out of that fund (*x*). The application to have them so allowed should be made at the hearing, for a cause will not be re-heard on the subject of costs alone (*y*).

And if there be costs and charges due to the trustee in any other suit or matter, he should apply to have them included and specially mentioned (*z*).

Other
charges, &c.
come under
just "allow-
ances."

The other charges and expenses of the trustee (comprehending all disbursements by him in the administration of the trust), may be claimed by him without any special order or direction of the Court. They are included under the usual direction in the decree to make "all just allowances" (*a*). These items should therefore be charged by the trustee in his accounts: and where fairly and properly chargeable, they will be allowed in passing such accounts before the chief clerk.

(*u*) *Pocoek v. Reddington*, 5 Ves. 800. The Court frequently fixes a sum, thus avoiding the expense and delay of taxation, see L. R. 4 Eq. 674. Two sets of costs may be set off against each other, 1 B. C. C. 362.

(*x*) *Edenborough v. Archbishop of Canterbury*, 2 Russ. 112; *Moore v. Frowd*, 3 My. & C. 49, per Lord Cottenham.

(*y*) *Colman v. Sarell*, 2 Cox, 206.

(*z*) *Payne v. Little*, 27 Beav. 83. A trustee's costs are not given him until he has paid in any balance due by him; *Birks v. Michlethwait*, 33 Beav. 409.

(*a*) *Fearns v. Young*, 10 Ves. 184.

As a general rule, where there are several trustees, they are expected to join in defending a suit, as well as in all other proceedings ; and one set of costs only will be allowed among them (*b*). In a case where three joint trustees had answered separately, Lord St. Leonards said, that circumstances might justify the defendants in putting in separate answers : and he accordingly directed the Taxing Master to allow to them the costs as of one answer only, unless he should find that any one had properly put in a separate answer, and then to allow his reasonable costs accordingly (*c*). Where in a suit against two trustees, who had severed in their defence, it appeared that one of them had misapplied the trust funds, but no imputation was thrown upon the other, one set of costs was allowed, and it was given wholly to the innocent trustee (*d*).

Where all the trustees are equally in fault, the one set of costs will be apportioned amongst them by the

One set of costs allowed in general to joint-trustees.

Apportionment between trustees as defendants.

(*b*) As to the circumstances that will justify joint-trustees in severing, and the effect of such severance upon the costs, see *Reade v. Sparkes*, 1 Moll. 10 ; *Nicholson v. Falkiner*, 1 Moll. 555, 560 ; *Gaunt v. Taylor*, 2 Beav. 346 ; *Aldridge v. Westbrook*, 4 Beav. 213 ; *Wiles v. Cooper*, 9 Beav. 294 ; *Hughes v. Key*, 20 Beav. 395. Where trustees sever for sufficient reason, full costs may be awarded to each ; but a trustee and his *estuique trust* will only receive one set of costs between them ; see *Aldridge v. Westbrook*, 4 Beav. 212 ; *Remnant v. Hood*, 27 Beav. 613.

(*c*) *Dudgeon v. Corley*, 4 D. & W. 158.

(*d*) *Webb v. Webb*, 16 Sim. 55 ; *Cummins v. Bromfield*, 3 Jur. N. S. 657.

Taxing Master (*e*). And it may conveniently be stated here, that where co-trustees are defendants in a suit, although the decree will usually be made against all yet an apportionment or contribution, or where all have not been equally in fault, a fixing of the loss on the person most in fault, may, as between the trustees, be directed, either in the same or in a new suit (*f*). But where fraud has been proved against trustees, the Court refuses to make any apportionment (*g*).

Costs disallowed of trustee unreasonably quitting;

A trustee retiring from the trust from mere caprice, without any reasonable ground for so doing, will have to bear the costs occasioned by his act (*h*). It has also been seen that circumstances arising in the administration of the trust, such as to alter the nature of its duties, may entitle the retiring trustee to his costs (*i*). Reasons relating to the trustee individually will not, in general, be considered as authorizing him to retire at the expense of the estate (*k*). It has, however, been held that a sole surviving trustee of advanced

(*e*) *Course v. Humphrey*, 26 Beav. 402; *Att.-Gen. v. Wyvillo*, 28 Beav. 464.

(*f*) *Baynard v. Woolley*, 20 Beav. 583; *Priestman v. Tindall*, 24 Beav. 244.

(*g*) *Tarleton v. Hornby*, 1 Y. & C. Exch. Cas. 336; *Att.-Gen. v. Wilson*, 1 Cr. & Ph. 28.

(*h*) *Hamilton v. Fry*, 2 Moll. 458; *Howard v. Rhodes*, 1 Kee. 581; *Porter v. Watts*, 16 Jur. 757; *Marshall v. Sladden*, 7 Ha. 428. A trustee removed for misconduct may be fixed with the costs of a new appointment, *Ex parte Greenhouse*, 1 Mad. 92.

(*i*) *Greenwood v. Wakeford*, 1 Beav. 576; *Forshaw v. Higginson*, 20 Beav. 485.

(*k*) *Forshaw v. Higginson*, supra.

age, who has performed the duties of the trust for a long period, may claim to be released, and will be allowed his costs, charges, and expenses (*l*).

A trustee is expected to act in a reasonable manner, not only in withdrawing from a trust, but in accepting it. Thus where a trustee had been appointed pending a suit to displace his predecessor, having had notice of some irregularities in the execution of the trust, he was refused his costs. The Court observed that a person thrusting himself, as it were, into a trust, was bound to inquire into the existing circumstances ; and by his neglect to do so, had disentitled himself to costs (*m*).

A trustee will not be allowed the costs of a suit unnecessarily or vexatiously commenced by him. Thus where a legacy had been assigned to trustees, and they commenced a suit for its recovery, notwithstanding that they had notice of the existence of a suit and decree for the administration of the assets, under which they might have proved, their costs were disallowed (*n*). So in another case where a suit had been unnecessarily commenced by trustees, who impeached the title of their *cestuisque trust* by suggesting doubts, the solution of which was not necessary to their own safety, although in so doing they had acted on the advice of counsel, they were nevertheless deprived of their costs (*o*).

or assuming
the trust.

No costs al-
lowed of un-
necessary or
vexatious
proceedings.

(*l*) *Gardiner v. Downes*, 2 Jur. N. S. 847; 25 L. J. 881.

(*m*) *Peatfield v. Benn*, 17 Beav. 522.

(*n*) *Packwood v. Maddison*, 2 Sim. & S. 232.

(*o*) *Devey v. Thornton*, 9 Hare, 222; *Bradby v. Whitchurch*, W. N. 1868, p. 81.

Costs under
Trustee Re-
lief Act.

Costs of proceedings under the Trustee Relief Act are, although the Act is silent as to costs, in all cases in the discretion of the Court (*p*). A trustee, who in a clear case, instead of paying trust money over to those entitled to receive it, lodges it in Court under the Trustee Relief Act, and puts them to the trouble and expense of an application to draw it out, may be obliged to pay costs (*q*). But it is not expected that a trustee will, in a doubtful case, run risks: and where there are adverse claimants, or where the person clearly entitled is under disability, a trustee is justified in taking advantage of this Act, and will be entitled to his costs (*r*).

Where there is a dispute only as to the persons entitled to the money, and not as to the amount payable, a trustee who needlessly files a bill instead of lodging the fund in Court under the Trustee Relief Act, will not be allowed the extra costs occasioned by his resort to the more expensive process (*s*). It is now settled that the costs of a petition by a tenant for life of a fund which has been lodged in Court under the Trustee Relief Act, are payable out of the income and not out of the *corpus* (*t*).

(*p*) *Re Armston*, 10 Jur. N. S. 715.

(*q*) *In re Woodburne*, 1 De G. & J. 333; see *In re Knight*, 27 Beav. 45.

(*r*) *In re Headington*, 27 L. J. Ch. 175; *Re Swan*, 12 W. R. 738; 2 Hem. & M. 34; *Re Wyly*, 28 Beav. 458.

(*s*) *Wells v. Malbon*, 31 Beav. 48. In such case the Court would now probably fix a small sum for the trustees' costs, see L. R. 4 Eq. 674; also 1 Ir. Rep. Eq. 489.

(*t*) *Re Marner's Trusts*, L. R. 3 Eq. 432 (overruling *Re Turnley*, L. R. 1 Eq. 152); *In re Cameron*, 1 Ir. Rep. Eq. 258.

Trustees taking advantage of this Act should pay in the *whole* fund; otherwise, in the absence of some special justification, they may be charged with the costs of accounting for the balance (*u*).

The Court will under some circumstances, in the exercise of its discretion, make no rule as to costs of proceedings against trustees, leaving each party to bear his own. This course has been adopted in several cases where the trustee has erred in ignorance, and through a wrong construction of doubtful words in the will or instrument (*x*); or where there has been a fair doubt as to the liability of the trustee to make good a loss caused by the misconduct of another person (*y*),—although the decree be made against the trustee (*z*); or where the *cestuisque trust* have been negligent in enforcing their rights (*a*).

There are in the Reports numerous cases bearing upon costs of trustees in proceedings in Chancery; the rule, however, can only be stated as follows: that **THE COURT WILL, IN EVERY CASE, EXERCISE ITS DISCRETION AS TO COSTS OF PROCEEDINGS.** All attempts to generalize upon, or classify the decisions, must be

Sometimes
the Court
will make no
rule as to
costs.

Costs of
trustees are
in the discre-
tion of the
Court.

(*u*) *Mitchell v. Cobb*, 17 L. T. 25. Other decisions as to costs under this act (which are of little value apart from the special circumstances of each case), will be found in Lewin on Trusts; Daniel's Ch. Pr.; Morgan on Costs, p. 211—218; and Adair on Costs, p. 199—207.

(*x*) *O'Callaghan v. Cooper*, 5 Ves. 117; *Mousley v. Carr*, 4 Beav. 49.

(*y*) *Roberts v. Ball*, 24 L. J. 471.

(*z*) *Macnamara v. Carey*, 1 Ir. Rep. Eq. 9.

(*a*) *Att.-Gen. v. Dudley*, Coop. 146.

more or less imperfect. With this understanding we proceed to remark that it seems tolerably clear, from the authorities, that in suits for the administration of trusts, the trustee, by impeaching the title of the plaintiffs (*b*), or by setting up a claim adversely to them (*c*), or by admitting as due a sum very much smaller than the sum actually due by him, will incur considerable risk of being disallowed his costs: if, however, the Court considers him to have acted *bonâ fide*, the costs may be given to him, although the Court may adopt the opposite view to that advanced by the trustee, and may admit to the full extent the demands of the *cestuique trust* (*d*), or may disallow any claim that may be made by the trustee (*e*).

**Summary of
the law of
costs of
trustees.**

V.-C. Malins.

The following may be usefully added, as containing the latest judicial summary of the rules of the Court as to costs of proceedings in relation to trusts. In a very recent case V.-C. Malins, in concluding his judgment, said—

“That most important question remains, who is to

(*b*) *Ball v. Montgomery*, 2 Ves. Jun. 199; *Devey v. Thornton*, 9 Ha. 222.

(*c*) *Att.-Gen. v. Brewers' Company*, 1 P. W. 376; *Willis v. Hiscox*, 4 My. & C. 197.

(*d*) *Poole v. Pass*, 1 Beav. 600. “I admit that it is only in a strong case that costs will be given against trustees; yet where they refuse, without a reasonable motive for their refusal, to act without suit, they will be visited with costs.” Per Lord Gifford, M. R., in *Goodson v. Ellisson*, 3 Russ. 589.

(*e*) *Bennett v. Going*, 1 Moll. 529; *Rashley v. Masters*, 1 Ves. Jun. 205. A trustee acting under the advice of counsel will not, in general, be ordered to pay costs; *Angier v. Stannard*, 3 My. & K. 572.

**When costs
are generally
speaking
disallowed.**

pay the costs? Now the principles of this Court with regard to the duties of trustees are well understood, and are very plain, and they never can with propriety be departed from. Those rules, as I understand them, are these:—that if a trustee conducts himself fairly and properly, having a due regard not only to some of his *cestuisque trust*, but to all; indifferently regarding the interest of all, and seeing while he is so doing something for the benefit of a tenant for life, that he is not disregarding the interests of those in remainder, he will receive from this Court every protection incidental to his position. But if a trustee shows by his conduct that he favours one at the expense of another *cestuique trust*, that instead of honestly exercising a discretion, he exercises it in a wanton, careless manner, to the advantage of one, and to the detriment of another; and if, above all, he omits that paramount duty of a trustee, which is, to have his accounts ready and open for inspection at all times, and to give the fullest information to all who are interested in the trust whenever they require it; that is conduct which the Court will not tolerate. If a trustee complies with his duties, the Court will protect him; but if he fails in them, the Court will make him pay the costs. I have a case here in which the whole course of conduct, from the beginning to the end, has been vexatious, irritating and unjustifiable, and I can have no hesitation in coming to the conclusion, as I do, that these defendants [the trustees] must pay the whole of the costs occasioned by the most improper proceedings

The duty of showing accounts and giving information.

in which they have embarked, and I order them to pay the costs accordingly."

His Honour proceeded to say that the only costs that ought to have been incurred in the case before him were the costs of a common administration suit; and added that he had on many occasions heard the late L. J. Knight Bruce exercise his discretion in naming a sum; he therefore now decreed a sum of 200*l.* to be deducted as the estimated costs of a proper suit, and the balance of the taxed costs to be paid by the trustees (*e*).

General duty
of assigning
over, when
trusts ended.

A trustee is, as a general rule, bound to convey or make over the trust property to his *cestuique trust*, when none of the trusts remain unfulfilled; and he may be charged with the costs of a suit occasioned by his refusal to do so (*f*). But if the trustee have reason to suspect that an arrangement has been made between a parent and his children in derogation of the just claims of the latter, that undue influence has been used, that there is an absence of fairness and good faith, the trustee may be justified in refusing to carry out the arrangement so made; and the Court will support him in his refusal, and will give him his

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(*e*) *Talbot v. Marshfield*, L. R. 4 Eq. 661, 674. V.-C. M. It can hardly be doubted that the practice of fixing a sum is a highly convenient one, as it informs the suitor at once as to the extent of his liability, and avoids the expense and delay of a reference to the Taxing Master.

(*f*) If the obligation to pay be acknowledged by the trustee, it may be the subject of an *action at law* against him, as well as a suit in equity. *Topham v. Morecraft*, 6 W. R. 295.

costs (*g*); but the grounds for suspicion must, in such a case, be evident (*h*).

Although it has been said to be the rule that where there has been a breach of trust, the costs are decreed against the trustee (*i*), this, like all other so-called rules on the subject of costs, is subject to many exceptions. The Court will in each case consider the conduct of the trustee and the other circumstances.

It by no means follows that a trustee who by making an improper investment, or otherwise, has incurred the liabilities of a breach of trust, will be ordered to pay all the costs of the suit. If his conduct has been *bonâ fide*, and straightforward, although he has made a mistake, the rule as to costs of suit may be otherwise (*j*). So far as a suit is in other respects for the benefit of the parties, as, for example, where it is required for the general administration of the estate, the costs of all parties, including the trustee, will in general be allowed (*k*); and a clear neglect of duty on the part of the trustee may only subject him to payment of so much of the costs as have been occasioned by his misconduct (*l*).

Costs do not necessarily follow decree against trustee.

(*g*) *Hannah v. Hodgson*, 30 Beav. 19; *King v. King*, 1 De G. & J. 663.

(*h*) *Firmin v. Pulham*, 2 De G. & Sm. 99.

(*i*) Lord Langdale in *Byrne v. Narcott*, 13 Beav. 346; see *Fitzgerald v. Fitzgerald*, 6 Ir. Ch. Rep. 145; *Kemp v. Burn*, 4 Giff. 348.

(*j*) See *Macnamara v. Carey* (on appeal), 1 Ir. Rep. Eq. 9.

(*k*) See *White v. Jackson*, 15 Beav. 191.

(*l*) *Pride v. Fooks*, 2 Beav. 430; *Heighington v. Grant*, 1 Phil. 600; *Knott v. Cottee*, 18 Beav. 77; *Tebbs v. Carpenter* 1 Mad. 290, 308; *Sanderson v. Walker*, 13 Ves. 601, 604.

Costs may be allowed when interest is decreed.

It was at one time held that wherever an account with interest was directed against a trustee, the costs of the suit would be given against him: the Court does not now exercise such severity (*m*). In a recent case a decree was made against the trustee, with compound interest, as he had retained moneys in his hands in the face of an express trust for accumulation. He was, nevertheless, allowed his costs, excepting costs of exceptions which had been overruled. In reference to a proposition to apportion the costs, Lord Romilly, M. R., expressed his disinclination to make refined distinctions in the apportionment of costs, on account of the expense of apportionment: Costs were accordingly ordered to the trustee, to be taxed as between solicitor and client, excluding the cost of his exceptions as above (*n*).

When the trustee will have to pay costs of the suit.

Where the suit is rendered necessary *solely* through the fraud, negligence, or misconduct, of the trustee (*o*),

(*m*) *Holgate v. Haworth*, 17 Beav. 259.

(*n*) *Knott v. Cotttee*, 18 Beav. 77.

(*o*) *Hide v. Haywood*, 2 Atk. 126; *Fell v. Lutridge*, Barr. 322; *Jones v. Lewis*, 1 Cox, 199; *Caffrey v. Darby*, 6 Ves. 488; *Roche v. Hart*, 11 Ves. 58, 62; *Crackelt v. Bethune*, 1 J. & W. 586; *Willis v. Hiseox*, 4 My. & C. 197; *Byrne v. Norcott*, 13 Beav. 336, 346. Where joint trustees have been guilty of a breach of trust, and a decree is made against them, the Court will not enter into the question, how far one defendant may be less culpable than another. The costs will be given against all. The question is not whether one of them is the more culpable, but whether the plaintiff is to be deprived of the double security which a decree for costs, against both the parties by whom his estate had been endangered, would give him; Lord Cottenham in *Lawrence v. Bowle*, 2 Phil. 140.

or even through his obstinacy or caprice (*p*), or refusal to account (*q*), he will, as a general rule, be ordered to pay all the costs of the suit.

However, in many cases special circumstances have, in the opinion of the Court, rendered the rule inapplicable (*r*). The exceptions are so numerous as to render impossible any definite statement as to what amount of misconduct, on the part of the trustee, will subject him to the costs of the suit. The Court will, in every case, regard not only his actions, but also the motives by which he appears to have been actuated. It is not the duty or the practice of the Court to visit trustees with penalties in the shape of costs, except where they act from interested motives, or wantonly and intentionally conduct themselves in a vexatious and oppressive manner (*s*).

Although the rule is, that where a suit has been instituted solely to make the trustee answerable for a

Motives of
trustee will
be considered.

Others may
be primarily
liable.

(*p*) "Trustees are entitled to the protection and direction of the Court in the exercise of their trusts, and can never be called upon to pay costs, unless they refuse to act without suit merely from obstinacy and caprice ;" per Sir J. Leach, in *Taylor v. Granville*, 3 Mad. 178. A similar penalty may be incurred by the trustee who from excess of caution prosecutes a suit where no question exists as to the rights of parties; *Bradby v. Whitchurch*, W. N. 1868, p. 81.

(*q*) See *Kemp v. Burn*, 4 Giff. 348; see also L. R. 4 Eq. 674, and p. 277, *ante*.

(*r*) *Pocock v. Reddington*, 5 Ves. 800; *Taylor v. Tabrum*, 6 Sim. 281; *Flanagan v. Nolan*, 1 Moll. 84; *Travers v. Townsend*, ib. 496; *Bennett v. Atkins*, 1 Y. & C. 249; *Att.-Gen. v. Dudley*, Coop. 146; *Att.-Gen. v. Caius Coll.* 2 Keen, 150.

(*s*) *Noble v. Meymott*, 14 Beav. 471, 480, (M. R.)

breach of trust, the decree will be made with costs (*t*). Yet if other persons have had the benefit of the breach of trust, they will be primarily liable (*u*).

Costs of
setting aside
sale to a
trustee. It was early decided that where a trustee for sale became himself the purchaser of the trust estate, and a decree was obtained setting aside the sale, the costs of the suit should be paid by the trustee (*x*). Cases have, however, occurred where the Court has taken into consideration the fair and honourable conduct of the defendant, and has declined to charge him with the cost of the suit against him (*y*), or has refused to award costs on account of unnecessary delay that has taken place on the part of the plaintiff (*z*).

Costs of
charity
trusts. Trustees of charity lands have been deprived of their costs, by reason of their having inserted in leases to tenants covenants for their own private advantage (*a*). But unless there be serious misconduct proved against them, trustees for charitable purposes are entitled to all costs out of the trust-property, and may charge them in their accounts. But charity trustees having several properties vested in them

(*t*) Per L. Langdale in *Byrne v. Norcott*, 13 Beav. 336.

(*u*) *Eaves v. Hickson*, 30 Beav. 136, where the sum due was ordered to be paid (1) by the parties who had the benefit of the breach of trust, (2) by the party who caused it by forging a certificate, (3) lastly by the trustees.

(*x*) In the leading case of *Fox v. Mackreth*, 4 Bro C. C. 400; see notes to that case in 2 Le Ca. Eq.

(*y*) *Baker v. Carter*, 1 Y. & C. Exch. 250.

(*z*) *Gregory v. Gregory*, Coop. 201; *Champion v. Rigby*, 1 Russ. & M. 539.

(*a*) *Att.-Gen. v. Mayor of Stamford*, 2 Sw. 592.

cannot indemnify themselves out of one, for expenses incurred in respect of others. And where on an information *ex officio*, a charity estate was held to have been lost through breach of condition, the trustees could not recover their costs, either from the Attorney-General or out of the estate (*b*).

There is reason for concluding, that when a purchase of the estate of an *infant cestuique trust* is set aside under the rule of Equity referred to, the ordinary maxim, that costs follow the decree, will be strictly adhered to. In a case where the estate of an infant had been purchased by trustees by public auction, and without any imputation of fraud, Lord Eldon, in ordering payment of the costs incident to a resale by the trustees, said that he did not consider that infants were bound to seek such relief against their trustees, at the hazard of the expense attending it (*c*).

In actions and suits between the trustee and third parties, he is in the same position as regards costs as any other plaintiff or defendant. If successful, he will, therefore, be entitled only to costs as between party and party (*d*). If he fail, only party and party costs can be recovered against him.

Where
cestuique
trust is an
infant.

Costs of pro-
ceedings be-
tween trustee
and third
parties.

(*b*) *Att.-Gen. v. Grainger*, 7 W. R. 684.

(*c*) *Sanderson v. Walker*, 13 Ves. 604. In this case the costs were apportioned : so much of them as had been incurred by reason of the conduct of the trustee were ordered to be paid by him. It is becoming usual to fix a sum for costs—avoiding a reference to the Taxing Master ; see L. R. 4 Eq. 674, and 1 Ir. Rep. Eq. 489.

(*d*) *Mohun v. Mohun*, 1 Swan. 201.

Recovery of
costs of
trustee.

So far as the trustee may fail in recovering costs awarded to him in proceedings taken on behalf of the trust, he will be authorized in charging them in his accounts, and they are admissible under a direction for "all just allowances." On the same principle he will be entitled to repayment of the *extra* costs as between attorney and client, when party and party costs only have (in the usual course) been recovered by him in such proceedings (*e*). A trustee has also been permitted to reimburse himself the amount of the costs of proceedings fairly and properly undertaken by him against third parties, in which he has failed; as also costs in proceedings against him, which he has been obliged to pay (*f*).

Costs paid by
trustee and
included in
his accounts.

In making payments of costs incurred by him, or otherwise payable by him, the trustee must be careful to pay no more than a proper amount. Although such costs cannot be taxed on the requisition of the *cestuique trust*, the trustee will pay them at his own risk; and the *cestuique trust* is entitled (as before stated) to have the amount *moderated*, as between himself and his trustee. The excess (if any) will then be disallowed on passing the trustee's accounts, and the loss caused by such overpayment will fall upon him.

Advances.
Interest.

Advances that may have been made by the trustee for the benefit of the estate, for example, rents of, and outgoings for, house property, or insurance premiums

(*e*) Lewin on Trusts, 5th edit. 451.

(*f*) *Edgecumb v. Carpenter*, 1 Beav. 174; *Lovat v. Fraser*, L. R. 1 Scotch App. 37, Lord Kingsdown.

on policies, will be repaid him, or allowed on passing his accounts ; and, in general, interest will be allowed on advances, where they appear to have been necessary, and no available trust fund existed (*g*). The "Court rate of interest" and that which may be charged by a trustee on advances by him, is 4 per cent. (*h*). It has been stated in a former chapter, that on taking the accounts, the trustee may be charged with interest on any considerable balances retained in his hands which ought to have been invested (*i*). It has been decided that interest cannot be claimed on money advanced by the trustee in payment of costs (*k*).

For the amount due to the trustee for costs, charges, and expenses properly incurred, he will have a *lien* on the trust estate (*l*). He cannot, therefore, be com-

Lien of the
trustee.

(*g*) *Clack v. Holland*, 19 Beav. 262, 273. An executor (query, a trustee also ?) may in his accounts place to his credit debts due to himself although they be barred by the Statute of Limitations ; *Stahlschmidt v. Lett*, 1 Sm. & G. 415.

(*h*) The Court rate of interest in Ireland is now 4 per cent., except as to *balances due by trustees* ; 211th G. O. of 1867 ; see Appendix.

(*i*) *Att.-Gen. v. Alford*, 4 D. M. & G. 843 ; and other cases cited in *Blogg v. Johnson*, L. R. 2 Ch. App. 225.

(*k*) *Gordon v. Trail*, 8 Price, 416 ; *Lewis v. Lewis*, 13 Beav. 82.

(*l*) *Darke v. Williamson*, 25 Beav. 622 ; *Morison v. Morison*, 7 D. M. & G. 214. This lien cannot be claimed by the trustee's solicitor, or by any agent or other person employed by the trustee ; they can only claim against him. *Hall v. Laver*, 1 Ha. 577 ; *Francis v. Francis*, 5 D. M. & G. 108. The nature of a solicitor's lien was fully explained by Lord Cottenham in *Bozon v. Bolland*, 4 My. & C. 357, 360 ; see also *Dunn v.*

Other remedies for present and future claims of trustee.

pelled to convey or assign to the *cestuique trust* until these demands be fully satisfied (*l*).

If there be no trust property available, the trustee will have a remedy in Equity against a *cestuique trust* at whose instance he has acted, and on whose behalf he has made necessary and proper advances of his own money (*m*) ; and the trustee may also require to be indemnified against a future legal liability (*n*) ; but it has been held that a trustee who lodges money in Court under the Trustee Relief Act cannot require a fund to be kept in Court to indemnify him against threatened proceedings (*o*).

Dunn, 7 D. M. & G. 25 ; *Hope v. Liddell*, 7 D. M. & G. 331 ; *Re Cullen*, 27 Beav. 51 ; *Shaw v. Neale*, 6 H. of L. Cas. 589 ; *Mornington v. Wellesley*, 4 Jur. N. S. 6, and cases cited.

(*l*) *Exp. James*, 1 D. & Ch. 272 ; *Exp. Chippendale*, 4 D. M. & G. 19 ; see *Morison v. Morison*, 7 D. M. & G. 226. It is of great importance to the trustee that an accurate and regular account of all his disbursements and expenses should be kept. In one instance the trustee claimed a lump sum, apparently not an excessive sum, to cover all his demands. The Court expressed its disapproval of this mode of accounting *by taking off one-fifth of the amount*. *Hethersell v. Hales*, 2 Ch. Rep. 158.

(*m*) *Exp. Chippendale*, 4 D. M. & G. 19, see 54 ; *Leedham v. Chawmer*, 4 K. & J. 458 ; see 20 Beav. 368.

(*n*) *Phene v. Gillan*, 5 Ha. 1.

(*o*) *Re Wright's Trust*, 3 K. & J. 419, 421.

Lien of other parties claiming through the trustee.

NOTE.—Arising out of the subject of the lien of the trustee for advances, &c., is the consideration of how far assignees of, or other claimants under the trustee, can establish any lien on the trust property. In *Murray v. Pinkett*, in the House of Lords (12 Cl. & F. 764), this question arose under the following circumstances :—Trust funds were invested in the purchase of shares in a company in the name of the trustee, who then and

Our brief summary of the law relating to the office of trustee is now at an end : and it can hardly be perused by any one without convincing him (even if he doubted it before) that it is highly inexpedient to become a trustee. It is hardly going too far to advise any person who is asked to fill the office, to decline it. Its duties are onerous, and its liabilities are perilous. It is absolutely certain that the common practice of leaving the management of a trust to one of several trustees

Conclusion :
proposal to
amend the
law by pro-
viding for
official dis-
charge of
duties of a
trustee.

afterwards was a holder of similar shares in his own behalf. The shares were not distinguished by number or otherwise, being in the nature of stock. The trustee agreed to assign some of the shares to the company, to secure advances made by them ; and on the bankruptcy of the trustee, not having the entire requisite number of shares standing in his name, the question arose, whether the company had any lien on the shares held in trust ? It was held that they had no such lien : that the trustee must be still considered as holding, for the purposes of the trust, the full number of shares which belonged to the *cestuisque trust* : and that as *no shares were actually transferred* to the Company, the question did not arise whether they were assignees for valuable consideration without notice. The observations of Lord Lyndhurst, L. C. (12 Cl. & F. 784), as also the judgment of the V. C. (2 Ha. 120), may be referred to for a statement of the principles on which the Court will act in such cases.

This subject was also considered in *Clack v. Holland* (19 Beav. 262), where premiums on policies held in trust had been advanced by third parties, who afterwards claimed a lien on the policies. The M. R. held that the doctrine of *Murray v. Pinkett* was applicable : A trustee cannot assign any interest in a policy except such as he has : under some circumstances, his payment of the premiums might give him a lien, and if so, he can assign it to another ; but if the circumstances of the case do not give him a lien, then he has none to transfer. A stranger, by paying premiums on a policy, will not necessarily acquire a lien upon it. Per Lord Romilly, M. R., 19 Beav. 277.

is illegal and dangerous : thus every trustee must feel the full burden of the trust, and share its full responsibility. The duty of showing accounts and giving information, at any moment, must be peculiarly burdensome to men who have their own occupations to attend to ; and it is almost impossible to find a trustee who, with some aptitude for business and knowledge of law, can devote sufficient time and attention to a trust. In Scotland, trusts can be performed without unduly burdening individuals ; and in England the trustee of a charity need be under no apprehension now that the more difficult duties of his office are in effect performed by the Charity Commissioners. Evidently facilities of a similar kind are urgently required for private trusts in England. If an “official trustee” were constituted by statute, to be under the control and direction of the Court of Chancery, or of one of the judges of that Court, a very great step in advance would be secured. The expense could easily be defrayed by a very small percentage on the trust-property to be managed. Or, if the objection to a new official staff be insuperable, the existing machinery of the Charity Commission might perhaps be utilized. But whatever the exact method of supplying an “official trustee” ought to be, it must be clear to all who have considered the subject, that the English law is at present very defective in leaving all the risks and responsibilities of trusteeship to any one who can be induced to accept what is always an honorary, and too often a thankless office.

APPENDIX A.

STATUTES.

THE TRUSTEE ACT, 1850 (*a*).

An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees.

13 & 14 Vict. c. 60.—5th Aug. 1850.

WHEREAS an Act (*b*) was passed in the first year of the reign of his late Majesty King William the Fourth, intituled “An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give Effect to their Decrees and Orders, in certain Cases ;” and whereas an Act (*c*) was passed in the fifth year of the reign of his late Majesty King William the Fourth, intituled “An Act for the Amendment of the Law relative to the Escheat and Forfeiture of Real and Personal Property holden in Trust ;” and whereas an Act (*d*) was passed in the

(*a*) The Act is here given entire, with the exception of sections 17, 18 and 19. The two former are repealed by the Extension Act of 1852; section 19 relates exclusively to mortgagees.

(*b*) 11 Geo. 4 & 1 Will. 4, c. 60.

(*c*) 4 & 5 Will. 4, c. 23.

(*d*) 1 & 2 Vict. c. 69.

second year of the reign of her present Majesty, intituled "An Act to remove Doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgagees ;" and whereas it is expedient that the provisions of the said Acts should be consolidated and enlarged : Be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all proceedings under the said Acts or any of them commenced before the passing of this Act may be proceeded with under the said recited Acts, or according to the provisions of this Act, as shall be thought expedient, and, subject as aforesaid, that the said recited Acts shall be and the same are hereby repealed : Provided always, that the several Acts repealed by the said recited Acts shall not be revived, and that such repeal shall only be on and after this Act coming into operation.

Interpretation of Terms.

2. And whereas it is expedient to define the meaning in which certain words are hereafter used ; it is declared that the several words hereinafter named are herein used and applied in the manner following respectively ; (that is to say),

The word "lands" shall extend to and include manors, messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein :

The word "stock" shall mean any fund, annuity, or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein :

The word "seised" shall be applicable to any vested estate for life, or of a greater description, and shall extend to estates at law and in equity, in possession or in futurity, in any lands :

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands :

The words "contingent right," as applied to lands, shall mean a

contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent :

The words "convey" and "conveyance," applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an Act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and the Substitution of more simple Modes of Assurance," and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold lands :

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate :

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another :

The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any Lord Keeper or Lords Commissioners of the Great Seal for the time being :

The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any Keeper or Lords Commissioners of the Great Seal of Ireland for the time being :

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception,

the words "trust" and "trustee" shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person :

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ de lunatico inquirendo :

The expression "person of unsound mind" shall mean any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs :

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person but by a title dependent solely upon the operation of the laws concerning devise and descent :

The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate :

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

Lord Chancellor may convey Estates of Lunatic Trustees, &c.

3. And be it enacted, that when any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct ; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

May convey contingent Rights.

4. And be it enacted, that when any lunatic or person of unsound mind shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor intrusted as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

Lord Chancellor may order Transfer of Stock of Lunatic Trustees, &c.

5. And be it enacted, that when any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons, together with any other person or persons the said Lord Chancellor may appoint.

Power to transfer Stock of deceased Person.

6. And be it enacted, that when any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind, as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order

vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons he may appoint.

Court of Chancery may convey Estates of Infant Trustees, &c.

7. And be it enacted, that where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly execnited a conveyance or assignment of the lands in the same manner for the same estate.

Contingent Rights of Infant Trustees, &c.

8. And be it enacted, that where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right.

Trustee out of the Jurisdiction of the Court.

9. And be it enacted, that when any person solely seised or possessed of any lands upon any trust shall be out of the jnrisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order vesting snch lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Persons seised of Lands jointly with Parties out of Jurisdiction, &c.

10. And be it enacted, that when any person or persons shall be

seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said Court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons, together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Contingent Rights of Trustees.

11. And be it enacted, that when any person solely entitled to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Persons jointly entitled with others out of the Jurisdiction, to a contingent Right.

12. And be it enacted, that when any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of a person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons, together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

Uncertainty which of several Trustees was the Survivor.

13. And be it enacted, that where there shall have been two or more persons jointly seised or possessed of any lands upon any trust,

and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Uncertainty whether the last Trustee be living or dead.

14. And be it enacted, that where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When Trustee dies without an Heir.

15. And be it enacted, that when any person seised of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate.

Contingent Right of unborn Trustee.

16. And be it enacted, that when any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such un-

born person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seized or possessed of in such lands.

17—18. [REPEALED.] 19. [RELATES TO MORTGAGEES.]

Power to appoint a Person to convey.

20. And be it enacted, that in every case where the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons born or unborn, it shall also be lawful for the Lord Chancellor intrusted as aforesaid, or the Court of Chancery (as the case may be), shold it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, would in the particluar case have had under the provisions of this Act; and in every case where the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, shall under the provisions of this Act be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established or to be established, it shall also be lawful for the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an order directing the secretary, deputy-secretary, or accountant-general for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this Act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies or societies, and their

officers and servants, for all acts done or permitted to be done pursuant thereto.

As to Lands in Lancaster and Durham.

21. And be it enacted, that as to any lands situated within the Duchy of Lancaster or the Counties Palatine of Lancaster or Durham, it shall be lawful for the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the County Palatine of Lancaster, or the Court of Chancery in the County Palatine of Durham, to make a like order in the same cases as to any lands within the jurisdiction of the same courts respectively as the Court of Chancery has under the provisions hereinbefore contained been enabled to make concerning any lands; and every such order of the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the County Palatine of Lancaster, or the Court of Chancery in the County Palatine of Durham, shall, as to such lands, have the same effect as an order of the Court of Chancery: Provided always, that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local courts to be an absent trustee or mortgagee within the meaning of this Act.

When Trustees of Stock out of the Jurisdiction.

22. And be it enacted, that when any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid or in such last-mentioned person or persons, together with any person or persons the said Court may appoint; and when any sole trustee of any stock or chose in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or in-

come thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

When Trustee of Stock refuses to transfer.

23. And he it enacted, that where any sole trustee of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Court of Chancery to make an order vesting the sole right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

When one of several Trustees of Stock refuses to transfer, &c.

24. And he it enacted, that where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.

Stock standing in the Name of a deceased Person.

25. And he it enacted, that when any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery,

or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint.

Effect of an Order vesting Right to transfer Stock.

26. And be it enacted, that where any order shall have been made under any of the provisions of this Act vesting the right to any stock in any person or persons appointed by the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of England, or such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requis-

tion of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof.

Effect of an Order vesting legal Right in a Chose in Action.

27. And be it enacted, that where any order shall have been made under the provisions of this Act, either by the Lord Chancellor intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any chose in action or any interest in respect thereof in any person or persons, such legal right shall vest accordingly ; and thereupon it shall be lawful for the person or persons so appointed to carry on, commence, and prosecute, in his or their own name or names, any action, suit, or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

Effect of an Order vesting Copyholds, &c.

28. And be it enacted, that whensover, under any of the provisions of this Act, an order shall be made, either by the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall without any surrender or admittance in respect thereof, vest accordingly ; and whensover, under any of the provisions of this Act, an order shall be made either by the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands ; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of a manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appoint-

nent shall have been made, being free from any disability, had duly done and executed such acts and instruments.

Decree made for Sale of Real Estate for Payment of Debts.

29. And be it enacted, that when a decree shall have been made by any Court of Eqnity, directing the sale of any lands for the payment of the debts of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed to be so seised, or possessed, or entitled, as the case may be, upon a trust within the meaning of this Act ; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.

Court may declare what Parties are Trustees, &c.

30. And be it enacted, that where any decree shall be made by any Court of Equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this Act, or to declare concerning the interests of nnborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this Act ; and thereupon it shall be lawful for the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Conrt or the said Lord Chancellor might under the provisions of this Act make concerning the estates, rights, and interests of trastees born or unborn.

Power to make Declarations, &c.

31. And be it enacted, that it shall be lawful for the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act shall be exercised; and thereupon the person or persons in whom such rights shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced.

Power to appoint new Trustees.

32. And be it enacted, that whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or trustees either in substitution for or in addition to any existing trustee or trustees.

New Trustees to have the Powers of Trustees appointed by Decree.

33. And be it enacted, that the person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as if he or they had been appointed by decree in a suit duly instituted.

Power to Court to vest Lands in new Trustees.

34. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to direct that any lands subject to the trust shall vest in the person or persons who, upon the appointment, shall be the trustee or trustees for such estate as the Court shall direct; and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate.

Power to Court to vest the Right to sue, &c.

35. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who, upon the appointment, shall be the trustee or trustees.

Old Trustees not discharged from Liability.

36. And be it enacted, that any such appointment by the Court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Who may apply.

37. And be it enacted, that an order, under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or chose in action, subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order under any of the provisions hereinbefore contained, concerning any lands, stock, or chose in action, subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage.

Power to go before the Master in the first Instance.

38. And be it enacted, that when any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, either from the Lord Chancellor intrusted as aforesaid, or from the Court of Chancery, it shall be lawful for him to exhibit

before any one of the Masters of the High Court of Chancery a statement of the facts whereon such order is sought to be obtained, and adduce evidence in support thereof; and if such evidence shall be satisfactory to the said Master, he shall, at the request of the person adducing such evidence, give a certificate under his hand of the several material facts found by him to be true, and of his opinion that such person is entitled to an order in the form set forth in such certificate.

Power to petition the Court or the Lord Chancellor.

39. And be it enacted, that any person who shall have obtained such certificate may apply by motion to the Court of Chancery, or to the Lord Chancellor intrusted as aforesaid, for an order to the effect set forth in such certificate, or for such other order as such person may deem himself entitled to upon the facts found by the Master.

Power to present Petition in the first Instance.

40. And be it enacted, that any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the Lord Chancellor intrusted as aforesaid, may, should he so think fit, present a petition in the first instance to the Court of Chancery, or to the Lord Chancellor intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such petition before the said Court, or the Lord Chancellor intrusted as aforesaid, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.

What may be done upon Petition.

41. And be it enacted, that upon the hearing of any such motion or petition it shall be lawful for the said Court, or for the said Lord Chancellor, should it be deemed necessary, to direct a reference to one of the Masters in Ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said Court, or for the said Lord Chancellor, to direct such motion or petition to stand over, to enable the petitioner or petitioners to adduce evidence or further evidence before

the said Court or before the said Lord Chancellor, or to enable notice or any further notice of such motion or petition to be served upon any person or persons.

Court may dismiss Petition with or without Costs.

42. And be it enacted, that upon the hearing of any such motion or petition, whether any certificate or report from a Master shall have been obtained or not, it shall be lawful for the Court, or the Lord Chancellor intrusted as aforesaid, to dismiss such motion or petition, with or without costs, or to make an order thereupon in conformity with the provisions of this Act.

Power to make an Order in a Cause.

43. And be it enacted, that whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the Masters of the Court of Chancery, the facts necessary for an order under this Act shall appear to such Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause, or of any petition or motion in the said cause or matter, to make such order under this Act.

Orders made, founded on certain Allegations, to be conclusive Evidence of the Matter so alleged.

44. And be it enacted, that whenever any order shall be made under this Act, either by the Lord Chancellor intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died, and it is not known who is his heir or devisee, then in any of such cases the fact that

the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation shall be conclusive evidence of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order: Provided always, that nothing herein contained shall prevent the Court of Chancery directing a reconveyance or reassignment of any lands conveyed or assigned by any order under this Act, or a redisposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

Trustees of Charities.

45. And be it enacted, that it shall be lawful for the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock or chose in action in the trustee or trustees of any charity or society over which charity or society the said Court of Chancery would have jurisdiction upon suit duly executed, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said Court under any statute authorizing the said Court to make an order to that effect in a summary way, upon petition.

No Escheat of Property held upon Trust, &c.

46. And be it enacted, that no lands, stock or chose in action, vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place.

Act not to prevent Escheat, &c., of Beneficial Interest.

47. And be it enacted, that nothing contained in this Act shall

prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to *any beneficial interest* therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to *any such beneficial interest*, shall be recoverable in the same manner as if this Act had not passed.

Money of Infants, &c., to be paid into Court.

48. And be it enacted, that where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock, or chose in action conveyed, assigned, or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the accountant-general, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said Court shall seem reasonable; and every cashier of the Bank of England, who shall receive any such money, is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

Court may make a Decree in the Absence of a Trustee.

49. And be it enacted, that where, in any suit commenced, or to be commenced, in the Court of Chancery, it shall be made to appear to the Court, by affidavit, that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with

the process of the Court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: Provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time of making such decree, for his own use or benefit, or otherwise than as a trustee as aforesaid.

Powers of the Master.

50. And be it enacted, that when any person shall, under the provisions of this Act, apply to one of the Masters of the Court of Chancery, in the first instance, and adduce evidence for the purpose of obtaining the certificate of such Master as a foundation for an order of the said Lord Chancellor intrusted as aforesaid, or the said Court of Chancery, it shall be lawful for the said Master to order service of such application upon any person, or to dismiss such application, and to direct that the costs of any persons consequent thereon shall be paid by the person making the same; and all orders of the Master under this Act shall be enforced by the same process as orders of the Court made in any suit against a party thereto.

Costs may be paid out of the Estate.

51. And be it enacted, that the Lord Chancellor intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or Court shall think proper.

Commission concerning Person of Unsound Mind.

52. And be it enacted, that upon any petition being presented under this Act to the Lord Chancellor intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said

Lord Chancellor, should he so think fit, to direct that a commission in the nature of a writ de lunatico inquirendo shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission.

Suit may be directed.

53. And be it enacted, that upon any petition under this Act being presented to the Lord Chancellor intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor or the said Court of Chancery to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose.

As to Property in the Colonies.

54. And be it enacted, that the powers and authorities given by this Act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations and colonies belonging to her Majesty (except Scotland).

Powers may be exercised by the Court in Ireland.

55. And be it enacted, that the powers and authorities given by this Act to the Court of Chancery in England shall and may be exercised in like manner and are hereby given and extended to the Court of Chancery in Ireland with respect to all lands and personal estate in Ireland.

Jurisdiction of Lord Chancellor in Lunacy as to Property in the Colonies.

56. And be it enacted, that the powers and authorities given by this Act to the Lord Chancellor of Great Britain intrusted as aforesaid, shall extend to all lands and personal estate within any of the dominions, plantations and colonies belonging to her Majesty (except Scotland and Ireland).

Jurisdiction of Lord Chancellor of Ireland.

57. And be it enacted, that the powers and authorities given by this Act to the Lord Chancellor of Great Britain intrusted as afore-

said shall and may be exercised in like manner and are hereby given to the Lord Chancellor of Ireland intrusted as aforesaid, with respect to all lands and personal estate in Ireland.

Short Title.

58. And be it enacted, that in citing this Act in other Acts of Parliament, and in legal instruments and in legal proceedings, it shall be sufficient to use the expression "The Trustee Act, 1850."

Commencement of Act.

59. And be it enacted, that this Act shall come into operation on the 1st day of November, 1850 (a).

TRUSTEE ACT (EXTENSION), 1852.

An Act to extend the Provisions of "The Trustee Act, 1850."

15 & 16 Vict. c. 55.—30th June, 1852.

WHEREAS it is expedient to extend the provisions of the Trustee Act, 1850: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same,

Court may make an Order vesting the Estate after a Decree or Order for Sale.

1. That when any decree or order shall have been made by any Court of Equity directing the sale of any lands for any purpose whatever, every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceed-

(a) This Act is considered in Chapter III. p. 40 et seq.

ing in which such decree or order shall have been made, and bound thereby, or being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case it shall be lawful for the Court of Chancery, if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate.

Power to make such Order on Refusal, &c. of a Trustee to convey, &c.

2. That sections numbered seventeen and eighteen in the Queen's printer's copy of the Trustee Act, 1850, be repealed; and in every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right it shall be lawful for the Court of Chancery, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person, in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate.

Power to make an Order for the Transfer of Stock, &c. in the Name of an Infant Trustee.

3. That when any infant shall be solely entitled to any stock

upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof; and when any infant shall be entitled jointly with any other person or persons to any stock upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them together with any other person or persons the said Court may appoint.

On Neglect to transfer Stock for twenty-eight Days, Order may be made vesting Right to transfer, &c.

4. That where any person shall neglect or refuse to transfer any stock, or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

On like Neglect by Executor, similar Order may be made.

5. When any stock shall be standing in the sole name of a deceased person, and his personal representative shall refuse or neglect to transfer such stock, or receive the dividends or income thereof for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint.

Bank of England and Companies to comply with Orders.

6. When any order being or purporting to be under this Act, or under the Trustee Act, 1850, shall be made by the Lord Chancellor

intrusted as aforesaid, or by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly; and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of England, or such companies, associations or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

Indemnity to Bank and Companies so complying.

7. That every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850, by the Lord Chancellor intrusted as aforesaid, or by the Court of Chancery, and duly passed and entered, shall be a complete indemnity to the Bank of England, and all companies and associations whatsoever, and all persons, for any act done pursuant thereto; and it shall not be necessary for the Bank of England, or such company or association or person, to inquire concerning the propriety of such order, or whether the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, had jurisdiction to make the same.

Power to appoint new Trustees, in lieu of Persons convicted of Felony.

8. That when any person is or shall be jointly or solely seised or possessed of any lands or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the Court of Chancery, upon proof of such conviction, to appoint any person to be a trustee in the place of such convict, and to make an order for vesting such lands, or the right to transfer

such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee: and such order shall have the same effect as to lands as if the convict trustee had been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same.

Power to the Court to appoint new Trustees where there is no existing Trustee.

9. That in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order.

Orders for Appointment of Trustees may be made in Lunacy.

10. In every case in which the Lord Chancellor intrusted as aforesaid has jurisdiction under this Act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to make an order appointing a new trustee or new trustees, in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in Chancery as well as in lunacy, or be passed and entered by the registrar of the Court of Chancery.

As to Powers of Persons intrusted with the Care of Lunatics.

11. That all the jurisdiction conferred by this Act on the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, shall and may be had, exercised, and performed by the person or persons for the time being intrusted as aforesaid.

Act to be construed as Part of Trustee Act, 1850.

12. That this Act shall be read and construed according to the definitions and interpretations contained in the second section of the Trustee Act, 1850, and the provisions of the said last-mentioned Act (except so far as the same are altered by or inconsistent with

this Act) shall extend and apply to the cases provided for by this Act, in the same way as if this Act had been incorporated with and had formed part of the said Trustee Act, 1850.

Certain Orders made under Trustee Acts to be chargeable with Stamp Duty.

13. That every order to be made under the Trustee Act, 1850, or this Act, which shall have the effect of a conveyance or assignment of any lands, or a transfer of any such stock as can only be transferred by stamped deed, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands, or entitled to such stock ; and every such order shall be duly stamped for denoting the payment of the said duty (a).

TRUSTEE RELIEF ACT, 1847.

An Act for better securing Trust Funds, and for the Relief of Trustees.

10 & 11 Vict. c. 96.—22nd July, 1847.

WHEREAS it is expedient to provide means for better securing trust funds, and for relieving trustees from the responsibility of administering trust funds in cases where they are desirous of being so relieved : Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same,

(a) This Act is considered in Chapter III. p. 46, *ante* : as to stamping orders, see p. 70.

*Trustees may pay Trust Moneys, &c., into the Court of Chancery :
Receipt of the proper Officer to be a sufficient discharge.*

That all trustees, executors, administrators, or other persons, having in their hands any moneys belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit shortly describing the instrument creating the trust, according to the best of their knowledge and belief, to pay the same, with the privity of the Accountant-General of the High Court of Chancery, into the Bank of England, to the account of such Accountant-General in the matter of the particular trusts (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said Court; and that all trustees or other persons having any annuities or stocks standing in their name in the books of the Governor and Company of the Bank of England, or of the East India Company, or South Sea Company, or any Government or Parliamentary securities standing in their names or in the names of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said Accountant-General, with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said Court; and in every such case the receipt of one of the cashiers of the said bank for the money so paid, or, in the case of stocks or securities, the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited.

*Court of Chancery to make Orders on Petition, without Bill,
for Administration of Trust.*

2. And be it enacted, that such orders as shall seem fit shall be, from time to time, made by the High Court of Chancery, in respect of the trust moneys, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment and payment of any such moneys, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks

and securities, and for the administration of any such trusts generally, upon a petition to be presented in a summary way to the Lord Chancellor or the Master of the Rolls, without bill, by such party or parties, as to the Court shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the Court shall see fit and direct; and every order made upon any such petition shall have the same authority and effect, and shall be enforced, and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the Court; and if it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls may direct any such suit or suits to be instituted.

Regulating Salary of Accountant-General.

3. Provided always and be it enacted, that the additional remuneration which the said Accountant-General may receive in consequence of the operation of this Act shall not have the effect of giving to him any claim for a larger income, by way of salary or otherwise, in the event of the said office of Accountant-General being hereafter regulated by competent authority, than would have been assigned to him if this Act had not been passed.

Power of making General Orders.

4. And be it enacted, that the Lord Chancellor, with the assistance of the Master of the Rolls or of one of the Vice-Chancellors, shall have power, and is hereby authorized to make such orders as from time to time shall seem necessary for better carrying the provisions of this Act into effect.

Interpretation.

5. And be it enacted, that in the construction of this Act, the expression "the Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper, and Lords Commissioners for the custody of the Great Seal of Great Britain for the time being.

TRUSTEE RELIEF ACT, 1849.

An Act for the further Relief of Trustees.

12 & 13 Vict. c. 74.—28th July, 1849.

WHEREAS difficulties have arisen in the transfer of securities vested in trustees, in certain cases, under the provisions of an Act passed in the session of Parliament holden in the tenth and eleventh years of the reign of her present Majesty, intituled "An Act for better securing Trust Funds, and for the Relief of Trustees," and it is expedient to make further provision for carrying into effect the objects of the said recited Act: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same,

Court of Chancery may, upon Application by Majority of Trustees, order Payment, &c., into Court.

That if upon any petition presented to the Lord Chancellor or Master of the Rolls, in the matter of the said Act, it shall appear to the Judge of the Court of Chancery before whom such petition shall be heard that any moneys, annuities, stocks, or securities are vested in any persons as trustees, executors, or administrators, or otherwise upon trusts within the meaning of the said recited Act, and that the major part of such persons are desirous of transferring, paying, or delivering the same to the Accountant-General of the High Court of Chancery under the provisions of the said recited Act, but that for any reason the concurrence of the other or others of them cannot be had, it shall be lawful for such Judge as aforesaid to order and direct such transfer, payment, or delivery to be made by the major part of such persons without the concurrence of the other or others of them; and where any such moneys or Government or Parliamentary securities shall be deposited with any banker, broker, or other depositary, it shall be lawful for such Judge as

aforesaid to make such order for the payment or delivery of such moneys, Government or Parliamentary securities, to the major part of such trustees, executors, administrators, or other persons as aforesaid, for the purpose of being paid or delivered to the said Accountant-General, as to the said Judge shall seem meet; and every transfer of any annuities, stocks, or securities, and every payment of money or delivery of securities, in pursuance of any such order, shall be as valid and effectual as if the same had been made on the authority or by the act of all the persons entitled to the annuities, stocks, or securities so transferred, or the moneys or securities so paid or delivered respectively, and shall fully protect and indemnify the Governor and Company of the Bank of England, the East India Company, and the South Sea Company, and all other persons acting under or in pursuance of such order.

TRUSTEE RELIEF ACT—IRELAND.

An Act for extending to Ireland an Act passed in the last Session of Parliament, intituled “An Act for better securing Trust Funds, and for the Relief of Trustees.”

11 & 12 Vict. c. 48.—31st August, 1848.

WHEREAS an Act (a) was passed in the last Session of Parliament, intituled “An Act for better securing Trust Funds, and for the Relief of Trustees,” and it is expedient to extend certain of the provisions of the said Act to Ireland: Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the

(a) 10 & 11 Vict. c. 96.

Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same,

Trustees may pay Trust Moneys, or transfer Stocks and Securities, into the Court of Chancery or Exchequer in Ireland : Certificate of Accountant-General to be sufficient Discharge.

That all trustees, executors, administrators or other persons having in their hands any moneys belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit shortly describing the instrument creating the trust, according to the best of their knowledge and belief, to pay the same, with the privy of the Accountant-General of the High Court of Chancery or of the Accountant-General of the Court of Exchequer in Ireland, into the Bank of Ireland, to the account of such Accountant-General in the matter of the particular trust (describing the same by the names of the parties as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said Courts respectively, and that all trustees or other persons having any annuities or stocks standing in their name in the books of the Governor and Company of the Bank of Ireland, or of any Canal Company in Ireland, or any Government or Parliamentary securities standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said Accountant-General with his privy in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said Courts respectively ; and in every such case the certificate of the Accountant-General of such payment, or of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid or the stocks or securities so transferred or deposited.

Courts of Chancery or Exchequer to make Orders on Petition without Bill, for Application of Trust Moneys and Administration of Trust.

2. And be it enacted, that such orders as shall seem fit shall be from time to time made by the said Court of Chancery and Conrt

of Exchequer, in respect of the trust moneys, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment and payment of any such moneys, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts generally, upon a petition to be presented in a summary way, without bill, by such party or parties as to the Court shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the Court shall see fit and direct; and every order made upon any such petition shall have the same authority and effect, and shall be enforced and subject to rehearing and appeal in the same manner, as if the same had been made in a suit regularly instituted in the Court; and if it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls, or the said Court of Exchequer, may direct any such suit or suits to be instituted.

Where Concurrence of all the Trustees, &c., cannot be procured, the Court or Judge empowered to order Transfer of Moneys, &c., by the major Part of such Trustees, &c.

3. And he it enacted, that if upon any petition presented in the matter of the said Act it shall appear to the Court or Judge before whom such petition shall be heard that any moneys, annuities, stocks, or securities are vested in any persons as trustees, executors, or administrators, or otherwise, upon trusts within the meaning of this Act, and that the major part of such persons are desirous of transferring, paying, or delivering the same to the Accountant-General of the High Court of Chancery, or to the Accountant-General of the Court of Exchequer in Ireland, under the provisions of this Act, but that, for any reason, the concurrence of the other or others of them cannot be had, it shall be lawful for the said Courts of Chancery and Exchequer respectively to order and direct that such transfer, payment, or delivery be made by the major part of such persons without the concurrence of the other or others of them; and where any such moneys or Government or Parliamentary securities shall be deposited with any banker, broker, or other depositary, it shall be lawful for such Courts respectively as afore-

said to make such order for the payment or delivery or transfer of such moneys, Government or Parliamentary securities, to the major part of such trustees, executors, administrators, or other persons as aforesaid, or otherwise, for the purpose of being paid or delivered or transferred to the said Accountant-General, as to the said Courts respectively shall seem meet ; and every transfer of any annuities, stocks, or securities, and every payment of money or delivery of securities, in pursuance of any such order, shall be as valid and effectual as if the same had been made on the authority or by the act of all the persons entitled to the annuities, stocks, or securities so transferred, or the moneys or securities so paid or delivered respectively, and shall fully protect and indemnify the Governor and Company of the Bank of Ireland, and all other persons acting under or in pursuance of such order.

Lord Chancellor, with Master of the Rolls, or the Court of Exchequer, may make Orders, &c.

4. And be it enacted, that the Lord Chancellor, with the assistance of the Master of the Rolls, shall have power and is hereby authorized to make such orders as from time to time shall seem necessary for better carrying the provisions of this Act into effect ; and the said Court of Exchequer shall have the like power and authority in respect to payments, transfers, or deposits made to or with the Accountant-General of that Court.

No Money paid in to be liable to Usher's poundage.

5. And be it enacted, that no money so paid into the Bank of Ireland to the credit of the Accountant-General of the Court of Chancery, or paid out under any order made under this Act by the Lord Chancellor or Master of the Rolls, shall be liable to usher's poundage.

Affidavit to state that Legacy Duty has been paid.

6. And be it enacted, that every affidavit to be made on the occasion of any payment of money or transfer or deposit of stocks or securities under this Act by any personal representative shall state that the legacy duty, if any payable thereon, has been duly paid.

Construction of Expression "Lord Chancellor."

7. And be it enacted, that in the construction of this Act the expression "the Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper and Lords Commissioners for the custody of the Great Seal of Ireland, for the time being.

LORD ST. LEONARDS' ACT.



An Act to further amend the Law of Property, and to relieve Trustees.

22 & 23 Vict. c. 35.—13th August, 1859.

[Sections 1—25 relate to Leases, Insurances, Rent-charges, and other matters arising out of the Law of Property.]

Trustees and Executors.—Trustee, &c. making Payment under Power of Attorney not to be liable by reason of Death of Party giving such Power.

26. No trustee, executor, or administrator making any payment or doing any act *bonâ fide* under or in pursuance of any power of attorney shall be liable for the moneys so paid or the act so done by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power, provided that the fact of the death, or of the doing of such act as last aforesaid at the time of such payment or act *bonâ fide* done as aforesaid by such trustee, execntor, or administrator, was not known to him: Provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but that such person so entitled shall

have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor, or administrator if the money had not been paid away under such power of attorney.

As to Liability of Executor or Administrator in respect of Rents, Covenants, or Agreements.

27. Where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

As to Liability of Executor, &c., in respect of Rents, &c. in Conveyances of Rent-charges.

28. In like manner, where an executor or administrator liable as such to the rent, covenants, or agreements contained in any con-

veyance or chief rent or rent-charge (whether any such rent be by limitation of use, grant, or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance or agreement for a conveyance as may have accrued due and be claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance ; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance ; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

As to Distribution of the Assets of Testator or Intestate after Notice given by Executor or Administrator.

29. Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the

said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof (as the case may be); but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively.

Trustee, Executor, &c. may apply by Petition to Judge of Chancery for Opinion, Advice, &c. in Management, &c. of Trust Property.

30. Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court of Chancery, or by summons upon a written statement to any such Judge at Chambers, for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate, such application to be served upon or the hearing thereof to be attended by all persons interested in such application, or such of them as the said Judge shall think expedient; and the trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said Judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of the said application: Provided nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made (b).

(b) See Chapter IX. p. 260, *ante*.

Every Trust Instrument to be deemed to contain Clauses for the Indemnity and Reimbursement of the Trustees.

31. Every deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following : that is to say, " That the trustees or trustee for the time being of the said deed, will, or other instrument shall be respectively chargeable only for such moneys, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively ; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument."

As to Investments by Trustees.

32. When a trustee, executor, or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India Stock, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock ; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in all other respects be reasonable and proper (c).

Extent of Act.—Act not to extend to Scotland.

33. This Act shall not extend to Scotland.

(c) See pp. 123—126, *ante.*

AMENDMENT OF LORD SAINT LEONARDS' ACT.

An Act to further amend the Law of Property.

23 & 24 Vict. c. 38.—23rd July, 1860.

[Sections 1—8 relate to Judgments, Waiver, Contingent Uses, and Mortgagees.]

*Form of applying for Advice of Judge, &c. under Section 30
of 22 & 23 Vict. c. 35.*

9. Where any trustee, executor, or administrator shall apply for the opinion, advice, or direction of a judge of the Court of Chancery under the 30th section of the Act of the twenty-second and twenty-third of her present Majesty, chapter thirty-five, the petition or statement shall be signed by counsel, and the Judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel, either in chambers or in Court, where he deems it necessary to have the assistance of counsel (*d*).

*Power to Lord Chancellors, &c. of England and Ireland to make
General Orders as to Investment of Cash under the Control
of the Court.*

10. It shall be lawful for the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal of England, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors of the said Court, or any three of them, and for the Lord Chancellor of Ireland, with the advice and assistance of the Lords Justices of Appeal and the Master of the Rolls in Ireland, to make such general orders from time to time as to the investment

(*d*) See p. 261, *ante*.

of cash under the control of the Court, either in the three per cent. consolidated or reduced or new bank annuities, or in such other stocks, funds, or securities as he or they shall, with such advice or assistance, see fit ; and it shall be lawful for the Lord Chancellor, Lord Keeper or Lords Commissioners in England, and for the Lord Chancellor in Ireland, to make such orders as he or they shall deem proper for the conversion of any three per cent. bank annuities now standing or which may hereafter stand in the name of the Accountant-General of the said Court of Chancery, in trust in any cause or matter, into any such other stocks, funds, or securities upon which, by any such general order as aforesaid, cash under the control of the Court may be invested ; all orders for such conversion of bank annuities into other funds or securities to be made upon petition to be presented by any of the parties interested in a summary way, and such parties shall be served with notice thereof as the Court shall direct (e).

Trustees, &c. to invest Trust Funds in the Stocks, &c. in which Cash under the Control of the Court may be invested.

11. When any such general order as aforesaid shall have been made it shall be lawful for trustees, executors, or administrators having power to invest their trust funds upon Government securities, or upon Parliamentary stocks, funds, or securities, or any of them, to invest such trust funds, or any part thereof, in any of the stocks, funds, or securities in or upon which by such general order cash under the control of the Court may from time to time be invested.

Clause 32 of 22 & 23 Vict. c. 35, to act retrospectively.

12. Clause thirty-two of the said Act of the twenty-second and twenty-third of Queen Victoria, chapter thirty-five, shall operate retrospectively.

(e) See pp. 125, 126, *ante.*

LORD CRANWORTH'S ACT.

An Act to give to Trustees, Mortgagees and others certain Powers not commonly inserted in Settlements, Mortgages and Wills.

23 & 24 Vict. c. 145.—28th August, 1860.

WHEREAS it is expedient that certain powers and provisions which it is now usual to insert in settlements, mortgages, wills, and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument : Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Powers of Trustees for Sale, &c. and Trustees of renewable Leaseholds.—Trustees empowered to sell may sell in Lots, and either by Auction or private Contract.

1. In all cases where by any will, deed, or other instrument or settlement it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale by selling such hereditaments, either together or in lots, and either by auction or private contract, and either at one time or at several times, and (in case the power shall expressly authorize an exchange) to exchange any hereditaments which for the time being shall be subject to the

uses or trusts aforesaid for any other hereditaments in England or Wales or in Ireland (as the case may be), and upon such exchange to give or receive any money for eqnality of exchange.

Sale may be made under special Conditions, and Trustees may buy in, &c.

2. It shall be lawful for the person making any snch sale or exchange to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale or exchange, as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction (*f*), and to rescind or vary any contract for sale or exchange, and to re-sell the hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby, and no purchaser under any such sale shall be bound to inquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other hereditaments or otherwise.

Trustees exercising Power of Sale, &c. empowered to convey.

3. For the purpose of completing any such sale or exchange as aforesaid, the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question, either by way of revocation and appointment of the use, or otherwise, as may be necessary.

Moneys arising from Sales, &c. to be laid out in other Lands.

4. The money so received upon any such sale or for eqnality of exchange as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed, or instrument containing the power of sale or exchange, or if no such indication be therein contained as to all or any part of such money, then the same shall with all convenient speed be laid out in the pnrchase of other hereditaments in fee simple in possession to be situate in England or Wales or in Ireland (as the case may be), or of lands of a leasehold or copyhold or customary tenure, which, in the opinion of the persons

(*f*) See p. 192, *ante.*

making the purchase, are convenient to be held therewith or with any other hereditaments for the time being, subject to the subsisting uses or trusts of the same will, deed, or other instrument of settlement in which the power of sale or exchange was contained ; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses, npon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoies, and declarations, to which the hereditaments sold or given in exchange were or would have been subject, or as near thereto as the deaths of parties and other intervening accidents will admit of, but not so as to increase or multiply charges ; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold or copyhold or cncstomary tenure shall be settled and assured upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoies, and declarations, as shall as nearly as may be correspond with and be similar to the aforesaid uses, trusts, intents, and purposes, powers, provisoies, and declarations, but not so as to increase or multiply charges, and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years ; and any such purchase as aforesaid may be made subiect to any special conditions as to title or otherwise : Provided, that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years.

Or in payment of Incumbrances.

5. Provided nevertheless, That it shall be lawful for the persons exercising any such power as aforesaid, if they shall think fit, to apply any money to be received, upon any sale or for eqnality of exchange as aforesaid, or any part thereof, in lien of purchasing lands therewith, in or towards paying off or discharging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subiect.

Money arising from Sales, &c. not to be laid out, nor Lands exchanged, elsewhere than in the Country in which Lands sold or exchanged are situated.

6. No money arising from any such sale or exchange of lands or hereditaments in England or Wales shall be laid out in the purchase of lands or hereditaments situate elsewhere than in England or Wales, and no lands situate in England or Wales shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in England or Wales; and no money arising from any such sale or exchange of lands in Ireland shall be laid out in the purchase of lands or hereditaments situate elsewhere than in Ireland, and no lands or hereditaments situate in Ireland shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in Ireland.

Until Purchase of Lands, &c. Money to be invested at Interest.

7. Until the money to be received upon any sale or for equality of exchange as aforesaid shall be disposed of in the manner herein mentioned, the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid, and the rents and profits thereof, in case such purchase and settlement as aforesaid were then actually made.

Trustees of renewable Leaseholds may renew.

8. It shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees, if therennto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as

shall be requisite in that behalf ; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same (g).

*Money for Equality of Exchange and for Renewal of Leases
may be raised by Mortgage, &c.*

9. In case any money shall be required for the purpose of paying for equality of exchange as aforesaid, or for renewal of any lease as aforesaid, it shall be lawful for the persons effecting such exchange or renewal to pay the same out of any money which may then be in their hands in trust for the persons beneficially interested in the lands to be taken in exchange, or comprised in the renewed lease, whether arising by any of the ways and means hereinbefore mentioned or otherwise, and notwithstanding the provisions for the application of money arising from sales or exchanges hereinbefore contained ; and if they shall not have in their hands as aforesaid sufficient money for the purposes aforesaid, it shall be lawful for such persons to raise the money required by mortgage of the hereditaments to be received in exchange or contained in the renewed lease (as the case may be), or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments taken in exchange or comprised in the renewed lease (as the case may be) shall be subject, and for the purpose of effecting such mortgage such persons shall have the same powers of conveying or otherwise assuring as are herein contained with reference to a conveyance on sale ; and no mortgagee advancing money upon such mortgage purporting to be made under this power shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid.

No Sale, &c. to be made without Consent of Tenant for Life, &c.

10. No such sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent of the person appointed to consent by the will, deed, or other instrument, or if no such person be appointed, then of the person entitled in possession

(g) See p. 225, *ante*.

to the receipt of the rents and profits of such hereditaments; if there be such a person under no disability ; but this clause shall not be taken to require the consent of any person where it appears from the will, deed, or other instrument to have been intended that such sale, exchange, or purchase should be made by the person or persons making the same without the consent of any other person.

[Sections 11—24 relate exclusively to the Powers of Mortgagees.]

Provisions as to Investment of Trust Funds, Appointment and Powers of Trustees and Executors, &c.—On what Securities Trust Funds may be invested.

25. Trustees having trust money in their hands which it is their duty to invest at interest shall be at liberty, at their discretion, to invest the same in any of the Parliamentary stocks or public funds, or in Government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature : Provided always, that no such original investment as aforesaid (except in the three per cent. consolidated bank annuities), and no such change of investment as aforesaid, shall be made where there is a person under no disability, entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person (*h*).

Trustees may apply Income of Property of Infants, &c. for their Maintenance.

26. In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the mainte-

(*h*) See p. 122—126, *ante*.

nance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not ; and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen : Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Provisions for Appointment of New Trustees on Death, &c.

27. Whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, shall die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid ; and so often as any new trustee or trustees shall be so appointed as aforesaid all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustee, shall with all convenient speed be conveyed, assigned, and transferred so that the same may be legally and effectually vested in such new trustee or trustees, either solely, or jointly with the surviving or continuing trustees or trustee, as the case may require ; and every

new trustee or trustees to be appointed as aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of Chancery either before or after the passing of this Act, shall have the same powers, authorities, and dispositions, and shall in all respects act, as if he had been originally nominated a trustee by the deed, will, or other instrument creating the trust (*i*).

Appointment of new Trustees in Cases herein named.

28. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator.

Trustee's Receipts to be Discharges.

29. The receipts in writing of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof (*k*).

Executors may compound, &c.

30. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition, releases and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby (*l*).

General Provisions.—Tenants for Life, &c. may execute Powers, notwithstanding Incumbrances.

31. For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income

(*i*) See pp. 26—29, *ante.* (*k*) See pp. 119, 120, *ante.*

(*l*) See cases cited in p. 186, n. *ante.*

of land or personal property, althongh his estate may be charged or incumbered, either by himself or by any former owner or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipts of the rents and income as aforesaid, unless they shall concur therein.

Powers, &c. hereby given may be negatived by express Declaration.

32. None of the powers or incidents hereby conferred or annexed to particular offices, estates, or circumstances shall take effect or be exercisable if it is declared in the deed, will, or other instrument creating such offices, estates, or circumstances that they shall not take effect; and where there is no such declaration, then if any variations or limitations of any of the powers or incidents hereby conferred or annexed are contained in such deed, will, or other instrument, such powers or incidents shall be exercisable or shall take effect only subject to such variations or limitations.

No Persons other than those entitled under the Settlement, &c. to be affected.

33. Nothing in this Act contained shall be deemed to empower any trustees or other persons to deal with or affect the estates or rights of any persons soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons if the deed, will, or other instrument under which such trustees or other persons are empowered to act had contained express powers for such trustees or other persons so to deal with or affect such estates or rights.

Commencement of Act.

34. The provisions contained in this Act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the passing of this Act, or under a will or codicil confirmed or revived by a codicil executed after that date.

Extent of Act.

35. This Act shall not extend to Scotland.

FRAUDULENT TRUSTEES. (CRIMINAL CONSOLIDATION.)

An Act to consolidate and amend the Statute Law of England and Ireland relating to Larceny and other similar Offences (a).

24 & 25 Vict. c. 96.—6th August, 1861.

Trustees, fraudulently disposing of Property, guilty of a Misdemeanor.—No Prosecution shall be commenced without the Sanction of some Judge or the Attorney-General.

80. Whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned : Provided, that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of her Majesty's Attorney-General, or, in case that office be vacant, of her Majesty's Solicitor-General : Provided also, that where any civil proceeding shall have been taken against any person to whom the provisions of this section may apply, no person who shall have taken such civil proceeding

(a) Re-enacting the provisions of the Fraudulent Trustees Act, 20 & 21 Vict. c. 54 (repealed).

shall commence any prosecution under this section without the sanction of the Court or Judge before whom such civil proceeding shall have been had or shall be pending.

No Person to be exempt from answering Questions in any Court, but no Person making a Disclosure in any compulsory Proceeding to be liable to Prosecution.

85. Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy or insolvency ; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any Court of law or equity, in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency.

No remedy at Law or in Equity shall be affected.—Convictions shall not be received in Evidence in Civil Suits.

86. Nothing in any of the last eleven preceding sections of this Act contained, or any proceeding, conviction, or judgment to be had or taken thereon against any person under any of the said sections, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any offence against any of the said sections might have had if this Act had not been passed ; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him ; and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

Certain Misdemeanors not triable at Sessions.

87. No misdemeanor against any of the last twelve preceding sections of this Act shall be prosecuted or tried at any court of general or quarter sessions of the peace (*a*).

THE IMPROVEMENT OF LAND ACT, 1864.

27 & 28 Vict. c. 114.—29th July, 1864.

Charges to be Personal Property; but Money authorized to be invested on Real Security may be invested therein, or on Mortgages thereof.

60. Every charge under this Act shall, as regards the holder thereof, be deemed to be personal property, except that any holder of such a charge, who shall desire to extinguish the same by re-uniting it to the land charged, shall have power for that purpose to direct by any deed that it shall be re-united to and merge in the beneficial interest in the said land, as if it were of the same nature and tenure therewith; but all trustees, directors and other persons who may be directed or authorized to invest any money on real security shall (unless the contrary be provided by the instrument directing or authorizing such investment) have power, at their discretion, to invest money in such charges or on mortgages thereof.

(*a*) These enactments were considered in *Reg. v. Hassall*, 9 W. R. 708, and *Reg. v. Fletcher*, 10 W. R. 753. In the former case a treasurer of a "money club," or unregistered friendly society, was held to be not within the Act. In the latter case a trustee of a savings bank, bound by its rules to apply deposits in a particular way and who had misappropriated the funds, was held on appeal to have been rightly convicted.

Charges not to preclude Trustees from investing in Purchase or on Mortgage of Lands.

61. No charge on land made by an absolute order by virtue of this Act shall be deemed such an incumbrance as shall preclude a trustee of money, with power to invest the same in the purchase of land or on mortgage, from investing it in a purchase or upon a mortgage of the land so charged, unless the terms of his trust or power expressly provide that the land to be so purchased or taken in mortgage be not subject to any prior charge (*a*).

THE MORTGAGE DEBENTURE ACT (1865).

An Act to enable certain Companies to issue Mortgage Debentures founded on Securities upon or affecting Land, and to make provision for the Registration of such Mortgaged Debentures and Securities.

28 & 29 Vict. c. 78.—29th June, 1865.

Further Powers of Investment to Trustees.

40. In all cases in which, by the instrument creating the trust, trustees have a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds or debentures of companies incorporated by or acting under the authority of an Act of Parliament, they may invest such trust moneys on the security of mortgage debentures duly issued under and in accordance with the provisions of this Act.

(*a*) See page 128, *ante*.

JURISDICTION OF COUNTY COURTS.

An Act to confer on the County Courts a limited Jurisdiction in Equity.

28 & 29 Vict. c. 99.—5th July, 1865.

Jurisdiction in Equity to be exercised in County Courts in certain Suits and Matters.

1. The County Courts held by virtue of an Act passed in the Session of Parliament holden in the ninth and tenth years of the reign of her Majesty, chapter ninety-five, shall have and exercise all the power and authority of the High Court of Chancery in the suits or matters hereinafter mentioned ; that is to say :—

1. In all suits by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law, or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made shall not exceed in amount or value the sum of five hundred pounds :
2. In all suits for the execution of trusts in which the trust estate or fund shall not exceed in amount or value the sum of five hundred pounds :
3. In all suits for foreclosure or redemption, or for enforcing any charge or lien where the mortgage, charge, or lien shall not exceed in amount the sum of five hundred pounds :
4. In all suits for specific performance, or for the delivering up or cancelling any agreement for the sale or purchase of any property where the purchase-money shall not exceed the sum of five hundred pounds :
5. In all proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts in which the trust estate or fund to which the proceeding relates shall

not exceed in amount or value the sum of five hundred pounds:

6. In all proceedings relating to the maintenance or advancement of infants in which the property of the infant shall not exceed in amount or value the sum of five hundred pounds:
7. In all suits for the dissolution or winding-up of any partnership in which the whole property, stock, and credits of such partnership shall not exceed in amount or value the sum of five hundred pounds:
8. In all proceedings for orders in the nature of injunctions where the same are requisite for granting relief in any matter in which jurisdiction is given by this Act to the County Court, or for stay of proceedings at law to recover any debt proveable under a decree for the administration of an estate made by the Court to which the application for the order to stay proceedings is made.

In Matters under this Act, Judge and Officers of the County Courts to have the Powers and Authorities of a Judge and Officers of the Court of Chancery.

2. In all such suits or matters the judge of a County Court shall, in addition to the powers and authorities now possessed by him, have all the powers and authorities for the purposes of this Act, of a Judge of the High Court of Chancery; and the treasurer, registrar, and high bailiff shall, in all matters in which the County Court has Jurisdiction under this Act, discharge any duties which an officer of the Court of Chancery can discharge, either under the order of a Judge of such Court or the practice thereof, and all officers of the County Courts shall in discharging such duties conform to any rules or orders to be framed as hereinafter provided.

Power to a Vice-Chancellor to order transfer of Suits from County Court to Court of Chancery.

3. Any one of the Vice-Chancellors, on the application at Chambers of any party to any suit or matter pending under this Act, shall have power, then and there, or, if he shall think fit, after

hearing a summons served upon the other party or parties, to transfer the same to the Court of Chancery, upon such terms, if any, as to security for costs or otherwise, as he may think fit.

Where amount of Subject-Matter of Suit exceeds limit of the Jurisdiction of County Court, Suit may be remitted to Court of Chancery, &c.

9. If during the progress of any suit or matter it shall be made to appear to the Court that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the County Courts is hereby limited, it shall not affect the validity of any order or decree already made, but it shall be the duty of the Court to direct the said suit or matter to be transferred to the Court of Chancery, and thereupon the said suit or matter shall proceed in such one of the Vice-Chancellors' Courts as the Lord Chancellor may by general order direct; and such Vice-Chancellor shall have power to regulate the whole of the procedure in the said suit or matter when so transferred: Provided always, that it shall be lawful for any party to apply to such Vice-Chancellor at Chambers for an order authorizing and directing the suit or matter to be carried on and prosecuted in the County Court, notwithstanding such excess in the amount of the limit to which jurisdiction in the matter is hereby given to the County Courts; and the Vice-Chancellor, if he shall deem it right to summon the other parties or any of them to appear before him for that purpose, after hearing such parties, or on default of the appearance of all or any of them, shall have full power to make such order.

In what Courts Proceedings shall be taken.

10. With respect to the Court in which proceedings in Equity shall be taken—

1. Proceedings under this Act which relate to the recovery or sale of any mortgage, charge, or lien on lands, tenements, or hereditaments shall be taken in that County Court within the district of which the lands, tenements, or hereditaments, or any part thereof, are situate:
2. Proceedings under the Trustee Acts, 1850 and 1852, shall be taken in the County Court within the district of which the

persons making the application, or any of them, reside or resides :

3. Proceedings for the administration of the assets of a deceased person shall be taken in the County Court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, shall have their or his place of abode :
4. Proceedings in partnership cases shall be taken in the County Court within the district of which the partnership business was or is carried on :
5. Proceedings for the specific performance or the delivery up or cancelling of agreements shall be taken in the County Court within the district of which the defendants, or any one of them, reside or resides, or carry on or carries on business :
6. Proceedings in any suit or other matter under this Act, which are not otherwise provided for, shall be taken or instituted in the County Court within the district of which the defendants, or any or either of them, shall reside or carry on business.

As to transfer of Suit from one County Court to another.

11. If during the progress of a suit or matter it shall be made to appear to the Court that the same could be more conveniently prosecuted in some other County Court, it shall be competent for the Court to transfer the same to such other County Court, and thereupon the suit or matter shall proceed in such other County Court.

NOTE.—Sect. 16 gives power to frame rules and orders ; and Sect. 17 gives power to frame scales of costs—all with the approval of the Lord Chancellor.

Sect. 18 enables parties to appeal to a Vice-Chancellor within thirty days, after a decision of the County Court under this Act.

INVESTMENT OF SCOTTISH TRUST FUNDS.

An Act to facilitate the Administration of Trusts in Scotland.

30 & 31 Vict. c. 96.—12th August, 1867.

Powers of Trustees under Trust Deeds with respect to Investments.

5. Trustees under any trust deed may, unless the contrary be expressly provided in such trust deed, invest the trust funds in the purchase of *any of the Government stocks, public funds or securities of the United Kingdom, or stock of the Bank of England*; or may lend the trust funds on the security of any of the aforesaid stocks or funds, or on the security of any heritable property in Scotland, and may from time to time at their discretion vary any such investment or loan: Provided that the trustees shall not be held to be subject as defendants or respondents to the jurisdiction of any of her Majesty's Superior Courts of Law or Equity in England or Ireland, either as trustees or personally, by reason of their having invested or lent trust funds as aforesaid.

INVESTMENTS IN EAST INDIA STOCK.

An Act to remove Doubts as to the Power of Trustees, Executors, and Administrators to invest Trust Funds in certain Securities, and to declare and amend the Law relating to such Investments.

30 & 31 Vict. c. 132.—20th August, 1867.

WHEREAS by an Act passed in the Session holden in the twenty-second and twenty-third years of her present Majesty, chapter thirty-five, “to further amend the Law of Property, and to relieve Trustees,” it is enacted, that “when a trustee, executor, or administrator shall not by some instruments creating his trust be expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock, and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper:”

And whereas doubts have arisen as to the legal effect and significance of the words “East India Stock” in the said Act mentioned :

Be it therefore enacted and declared by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Application of Term “East India Stock” in recited Act.

1. The words “East India Stock” in the said Act passed in the session holden in the twenty-second and twenty-third years of her Majesty, chapter thirty-five, shall include and express as well the East India stock which existed previously to the thirteenth day of

August one thousand eight hundred and fifty-nine, when the said Act received the assent of her Majesty, as East India stock charged on the revenues of India, and created under and by virtue of any Act or Acts of Parliament which received her Majesty's assent on or after the thirteenth day of August one thousand eight hundred and fifty-nine; and it shall be lawful for every trustee, executor, or administrator to invest any trust fund in his possession or under his control in the stock created by the last-mentioned Act or Acts to the same extent, and for the same purposes and objects, as he can now invest such trust fund in the East India stock which existed previously to the thirteenth day of August one thousand eight hundred and fifty-nine.

Trustees may invest in any Securities Interest whereon is guaranteed by Parliament.

2. It shall be lawful for every trustee, executor, or administrator to invest any trust fund in his possession or under his control in any securities the interest of which is or shall be guaranteed by Parliament to the same extent and in the same manner as he may invest such trust fund in such securities as aforesaid (a).

COUNTY COURTS.

An Act to amend the Acts relating to the Jurisdiction of the County Courts.

30 & 31 Vict. c. 142.—20th August, 1867.

Trustees may pay Trust Moneys or transfer Stock and Securities into the Court.

24. Any moneys, annuities, stocks, or securities vested in any persons as trustees, executors, administrators, or otherwise, upon

(a) See page 124, *ante.*

trusts within the meaning of an Act passed in the session of Parliament holden in the tenth and eleventh years of the reign of her present Majesty, chapter ninety-six, "for better securing "trust funds, and for the relief of trustees," where the same does not exceed in amount or value the sum of five hundred pounds, npon the filing by such trustees or other persons, or the major part of them, to or with the registrar of the county court within the district of which such persons or any of them shall reside, an affidavit shortly describing the instrument creating the trust according to the best of their knowledge, may in the case of money be paid into a post-office savings bank established in the town in which the county court is held in the name of the registrar of such court, in trust to attend the orders of the Court, and upon such persons filing with the registrar the receipt or other document given to them by the officer of the said bank the registrar shall record the same, and give to them an acknowledgment in such form as may be directed by any rule of practice, which acknowledgment shall be a sufficient discharge to such persons for the money so paid, and in the case of stocks or securities may be transferred or deposited into or in the names of the treasurer and registrars of such Court, in trust to attend the orders of the Court, and the certificate of the proper officer of the transfer or deposit of such stocks or securities shall be a sufficient discharge to such persons for the stocks or securities so transferred or deposited; provided that where there is not a treasurer a person shall be nominated by rule of practice to whom the transfer or deposit in conjunction with the registrar may be made.

Extension of Powers given by 12 & 13 Vict. c. 74, to Court of Chancery to County Courts.

25. For the purposes of the last section all the powers and authorities given to the Court of Chancery by the Act passed in the session of Parliament holden in the twelfth and thirteenth years of the reign of her present Majesty, chapter seventy-four, "for the further relief of Trustees," shall be possessed and exercised by the County Courts, and any order made by virtue of such powers and authorities shall fully protect and indemnify all persons acting under or in pursuance of such order.

POLICIES OF ASSURANCE.

An Act to enable Assignees of Policies of Life Assurance to sue thereon in their own Names.

30 & 31 Vict. c. 144.—20th August, 1867.

WHEREAS it is expedient to enable assignees of policies of life assurance to sue thereon in their own names :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Assignees of Life Policies may sue in their own Names.

1. Any person or corporation now being or hereafter becoming entitled, by assignment or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for moneys thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such moneys.

Defence or Reply on equitable Grounds may be pleaded.

2. In any action on a policy of life assurance, a defence on equitable grounds, or a reply to such defence on similar grounds, may be respectively pleaded and relied upon in the same manner and to the same extent as in any other personal action.

Notice of Assignment to be given.

3. No assignment made after the passing of this Act of a policy of life assurance shall confer on the assignee therein named, his executors, administrators or assigns, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a

written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being, or in case they have two or more principal places of business, then at some one of such principal places of business, either in England or Scotland or Ireland, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment ; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed.

Principal Places of Business to be specified on Policies.

4. Every assurance company shall, on every policy issued by them after the thirtieth day of September, one thousand eight hundred and sixty-seven, specify their principal place or principal places of business at which notices of assignment may be given in pursuance of this Act.

Assignment by Endorsement or separate Instrument.

5. Any such assignment may be made either by endorsement on the policy or by a separate instrument in the words or to the effect set forth in the Schedule hereto, such endorsement or separate instrument being duly stamped.

Notices of Assignment to be acknowledged.

6. Every assurance company to whom notice shall have been duly given of the assignment of any policy under which they are liable shall, upon the request in writing of any person by whom any such notice was given or signed, or of his executors or administrators, and upon payment in each case of a fee not exceeding five shillings, deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company of their receipt of such notice ; and every such written acknowledgment, if signed by a person being *de jure* or *de facto* the manager, secretary, treasurer, or other principal officer of the assurance company whose acknowledgment the same purports to be, shall be conclusive evidence as against such assurance

company of their having duly received the notice to which such acknowledgment relates.

Interpretation of Terms.

7. In the construction and for the purposes of this Act the expression "Policy of Life Assurance," or "Policy," shall mean any instrument by which the payment of moneys, by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured; and the expression "Assurance Company" shall mean and include every corporation, association, society, or company now or hereafter carrying on the business of assuring lives or survivorships, either alone or in conjunction with any other object or objects.

Not to apply to Contracts under certain Acts.

8. Provided always, that this Act shall not apply to any policy of assurance granted or to be granted or to any contract for a payment on death entered into or to be entered into in pursuance of the provisions of the Acts, sixteenth and seventeenth Victoria, chapter forty-five, and twenty-seventh and twenty-eighth Victoria, chapter forty-three, or either of those Acts, or to any engagement for payment on death by any friendly society.

Short Title.

9. For all purposes this Act may be cited as "The Policies of Assurance Act, 1867"(a).

SCHEDULE.

I A. B. of, &c., in consideration of, &c., do hereby assign unto C. D. of, &c., his executors, administrators and assigns, the [within] policy of assurance granted, &c. [*here describe the policy*]. In witness, &c.

(a) This Act was considered in *Scottish A. A. Society v. Fuller*, 2 Ir. Rep. Eq. 53.

APPENDIX B.

ORDERS AND RULES OF COURT.

CONSOL. ORDER XXXV.

THE business to be disposed of by the Master of the Rolls and the Vice-Chancellors, respectively, while sitting at *Chambers*, shall comprise (*inter alia*) :—

- (1.) Applications for payment to any person of the dividends or interest of any stocks, funds or securities, standing to the credit of any cause or matter depending to the separate account of such person.
 - (3.) Applications under the TRUSTEE RELIEF ACTS in all cases where the trust fund does not exceed 300*l.* cash or 300*l.* stock, as the case may be.
 - (4.) Applications under the TRUSTEE ACTS, 1850 and 1852, in all cases where any decree or order shall have been made by the Court for the sale or conveyance of any lands or hereditaments, corporeal or incorporeal, whatever may be the estate or interest therein (a).
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TRUSTEE RELIEF ACT.

CONSOL. ORDER XLI.

Contents of Affidavit.

RULE 1. Any trustee desiring to pay money, or transfer stock or securities into the name of the Accountant-General of the Court of Chancery, under the stat. 10 & 11 Vict. c. 96, shall file an affidavit,

(a) See Morgan, Ch. St. & Ord. (4th ed.) p. 543, *et seq.* For forms of proceedings, see "Forms to Daniell's Ch. Pr.", by Field and Dunn, pp. 1935—1947.

entitled "In the Matter of the Act and of the Trust," and setting forth—

- i. His own name and address.
- ii. The place where he is to be served with any petition or any notice of any proceedings or order of the Court or of the judge in Chambers, relating to the trust fund.
- iii. The amount of the money, stock or securities, which he proposes to pay or transfer into, or deposit, transfer to, or pay into Court, to the credit of the trust.
- iv. A short description of the trust, and of the instrument creating it.
- v. The names of the parties interested in or entitled to the fund, to the best of the knowledge and belief of the trustee.
- vi. The submission of the trustee to answer all such inquiries relating to the application of the money, stock or securities, transferred, paid in or deposited under the Act, as the Court or the judge in Chambers may think proper to make or direct.

Payment of the Fund into Court.

RULE 2. The Accountant-General, on production of an office copy of the affidavit, shall give the necessary directions for payment, transfer or deposit, and place the money, stock or securities, to the account of the particular trust; and such payment, transfer or deposit, shall be certified in the usual manner.

Investment, &c.

3. Provides for the investment and accumulation of the fund.

Notice to the Parties interested.

4. The trustee having made the payment, transfer or deposit, shall forthwith give notice thereof to the several persons named in his affidavit, as interested in, or entitled to the fund.

Applications to the Court respecting the Fund.

5. Such persons, or any of them, or the trustee, may apply by petition, or in cases under 300*l.* by summons, as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof.

Service on the Trustee.

6. The trustee shall be served with notice of any application made to the Court or the judge, respecting the fund, or the dividends or interest thereof, by any party interested therein, or entitled thereto.

Service on all Parties interested.

7. The persons interested in, or entitled to the fund, shall be served with notice of any application made by the trustee to the Court or the judge, respecting the fund in Court, or the interest or dividends thereof.

Residence of Petitioner.

8. No petition shall be set down to be heard and no summons shall be sealed, until the petitioner or applicant has first named in his petition or summons a place where he may be served with any petition, or with notice of any proceeding or order of the Court, relating to the trust fund.

Title of Petitions and Affidavits.

9. Petitions presented, summonses issued, and affidavits filed, under the said Act, shall be entitled "In the Matter of the said Act (10 & 11 Vict. c. 96), and in the Matter of the particular Trust."

II. Proceedings under the Charitable Trusts Act, 16 & 17 Vict. c. 137.

10. Any application to a judge in Chambers under the Charitable Trusts Act, 1853, s. 28, shall be made by summons, and such summons may be in the form set out in Sched. K, No. 1, or as near thereto, as the nature of the case may permit.

11, 12 and 13 relate to fees, costs and appeal ; and will be found in Morgan, Ch. St. (4th ed.), 598.

III. Proceedings under the Settled Estates Act.

The Rules will be found in Morgan, Ch. St., as above.

INVESTMENTS—LORD ST. LEONARDS' ACT.

ORDER OF COURT, 1ST FEB. 1861.

*As to Investment of Sums of Money in pursuance of
Stat. 23 & 24 Vict. c. 38.*

1. Cash under the control of the Court may be invested in Bank Stock (*a*), East India Stock (*b*), Exchequer Bills, and 2*l.* 10*s.* per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales ; as well as in Consolidated 3*l.* per Cent. Annuities, Reduced 3*l.* per Cent. Annuities, and New 3*l.* per Cent. Annuities.

2. Every petition for the purpose of the conversion of any 3*l.* per Cent. Bank Annuities into any other of the stocks, funds or securities, hereinbefore mentioned, shall be served upon the trustees, if any, of such Bank 3*l.* per Cent. Annuities, and upon such other persons, if any, as the Court shall think fit (*c*).

THE RATE OF INTEREST.

The Court rate of interest is fixed at four per cent. by Cons. Ord. XLII., Rules 9, 10. See Morgan Ch. St. & O. (4th ed.), p. 612.

In Ireland the Court rate of interest has lately been fixed by the following Gen. Order of 1867 :—

No. 211. The Court rate of interest shall be deemed to be and be calculated at four per cent., save with respect to the balances due by receivers, guardians, sequestrators, executors, administrators, and trustees : and the Court rate of interest as to such balances shall be calculated at *five* per cent.

(*a*) An order of Lord Eldon (frequently renewed), which directed payment of part only of the large dividend arising from bank stock, and re-investment of the balance, is now regarded as obsolete. See Morgan, Ch. St. (3rd ed.) 334. As regards future orders to pay dividends, the *whole* dividend on bank stock will be drawn, under order of 16th August, 1861, Morgan (4th ed.), p. 630.

(*b*) For the meaning of "East India Stock" see the Act of 1867, which will be found p. 349.

(*c*) For the forms of proceedings under the Trustee Acts and Trustee Relief Acts, see "Forms to Daniell's Ch. Practice," by Field and Dunn, pp. 1935—1947.

EQUITY PROCEDURE.

An Act to amend the Practice and course of Proceeding
in the High Court of Chancery.

15 & 16 Vict. c. 86.—1st July, 1852.

Sect. 42, Rule 9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the Court may upon consideration of the matter on the hearing, if it shall so think fit, order such persons or any of them to be made parties.

[A similar rule appears in the Irish Chancery Act, 30 & 31 Vict. c. 44, s. 66, Rule 10.]

SPECIAL CASE UNDER SIR G. TURNER'S ACT.

An Act to diminish the Delay and Expense of Proceed-
ings in the High Court of Chancery in England.

13 & 14 Vict. c. 35.—15th July, 1850.

Sect. 15. And be it enacted, that every executor, administrator, trustee or other person making any payment or doing any act in conformity with the declaration contained in any decree made upon a special case, shall in all respects be as fully and effectually pro-
tected and indemnified by such declaration as if such payment had been made or act done under or in pursuance of the express order of the said Court made in a suit between the same parties instituted by bill, save only as to any rights or claims of any person in re-
spect of matters not determined by such declaration.

[A similar clause appears in the Irish Chancery Act, 30 & 31 Vict. c. 44, s. 125.]

TRUSTEE RELIEF ACT (IRELAND).

ORDER OF THE COURT OF CHANCERY IN IRELAND OF OCTOBER 9TH, 1848.

Contents of Affidavit.

1. Any trustee desiring to pay money, or transfer stock or securities into the name of the Accountant-General of the Court of Chancery, under the said Act, is to file an affidavit, entitled in the matter of the Act and of the Trust, and setting forth—

- I. His own name and address.
- II. The place where he is to be served with any petition, or any notice of any proceeding or order of the Court relating to the trust fund.
- III. The amount of stock, securities, or money which he proposes to deposit or transfer, or to pay into Court, to the credit of the trust.
- IV. A short description of the trust, and of the instrument creating it.
- V. The names of the parties interested in or entitled to the fund, to the best of the knowledge and belief of the trustee.
- VI. The submission of the trustee to answer all such inquiries relating to the application of the stocks, securities or money transferred, deposited or paid in, under the Act, as the Court may think proper to make or direct.

Side-bar Rule.

2. The party filing such affidavit, on production of an attested copy thereof, is to be at liberty to enter a side-bar rule to lodge or invest the money, stock or security specified in such affidavit, in the Bank of Ireland, with the privity of the Accountant-General, to the account of the particular trust.

Lodging the Money.

3. The Accountant-General, on production of an office copy of the affidavit and rule, is to give the necessary directions for transfer, deposit or payment, and to place the stock, securities or money to the account of the particular trust; and such transfer, deposit or payment is to be certified in the usual manner.

Notice to Cestuique Trust.

4. The trustee having made the payment, transfer or deposit, is forthwith to give notice thereof to the several persons named in his affidavit, as interested in, or entitled to the fund.

Paying out of Fund.

5. Such persons, or any of them, or the trustee, may apply by petition, as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof.

Notice to the Trustee.

6. The trustee is to be served with notice of any application made to the Court respecting the fund, or the dividends or interest thereof, by any party interested therein, or entitled thereto.

Notice to all Parties interested.

7. The parties interested in, or entitled to the fund, are to be served with notice of any application made to the Court by the trustee, respecting the fund in Court, or the interest or dividends thereof.

Residence of Petitioner.

8. No petition is to be set down to be heard, until the petitioner has first named a place where he may be served with any petition, or notice of any proceeding or order of the Court, relating to the trust fund.

Title of Affidavit.

9. Petitions presented, and affidavits filed, and rules entered, under the said Act, are to be entitled "In the Matter of the said Act (11 & 12 Vict. c. 68), and in the Matter of the particular Trust."
-

INVESTMENTS—LORD ST. LEONARDS' ACT.

The following is the order of the Irish Court of Chancery, made 24th May, 1861 :—

1. Cash, under the control of the Court, may be invested in Bank of Ireland Stock, and upon mortgage of freehold and copyhold (*a*) estates, respectively, in Ireland, as well as in Government New 3*l.* per Cent. Stock, and Consolidated 3*l.* per Cent. Stock.
 2. Every petition for the purpose of the conversion of any Government New 3*l.* per Cent. Stock, into any other of the stocks, funds or securities, hereinbefore mentioned, shall be served upon the trustees of any of such 3*l.* per Cent. Stock, and upon such other persons as the Court shall think fit (*b*).
-

TRUSTEE ACT (IRELAND).

[In order that the Court may be fully informed, and that a reference to chambers may be unnecessary, practitioners should be careful in their petitions and affidavits to follow the directions of May, 1853, which, although originally designed for statements of facts under the old practice, are, with the alterations of a few words, equally applicable to the new practice. *In re Crane*, Ir. L. Times, 1868, p. 226, V.-C.]

Statements required for Appointment of new Trustee, Orders of May, 1853.

To be embodied in the Petition and Affidavit :—

- (1). A precise statement of the beneficial interest of the party by whom, or on whose behalf (in case of disability) the application is made.
- (2). In setting forth the instrument creating the trusts, a brief but distinct specification of all the trust funds and pro-

(*a*) There are, in fact, no copyhold estates in Ireland.

(*b*) See pp. 123—126, *ante*.

- erty comprised, and of the several trusts created, distinguishing such of the trusts (if any) as have ceased or been determined, and such as are subsisting.
- (3). Whether all the trust funds and property are still existing and available, and the present circumstances, and date of investment, of the funds.
 - (4). If any portion of them should not be existing or available, when, how and by whose act or default (if any) they have been lost.
 - (5). The names, descriptions, and places of abode of the several persons beneficially interested, and whether any and which of them are infants, lunatics, or under any other, and what incapacity or disability.
 - (6). Whether all the persons interested have been applied to, and concur in the appointment of the proposed trustee or trustees; and if not, why not?
 - (7). The written consent of any who shall have concurred should be procured, and stated to be in their hand-writing, or signed by them, as the case may be.
 - (8). The name, addition and full address of each trustee, or representative of a deceased trustee, in whose stead a new trustee is sought to be appointed; and whether he has executed the trust deed (if any), or ever accepted, or acted in the trust.
 - (9). In the case of an existing trustee refusing or being unwilling to act, the reason or reasons for such refusal or unwillingness, with a positive allegation that the applicant knows not, and has not been informed and does not believe, that such trustee ever assigned or had any other cause or reason for not acting or continuing to act, as the case may be, save as therein set forth.
 - (10). When a trustee is sought to be removed on the ground of being out of the jurisdiction, at what time he left the jurisdiction, where (if known) he is at present residing, and whether such residence is permanent or temporary (if not known), and what inquiries have been made to discover his place of abode.
 - (11). The name, addition and address *in full*, and profession

or occupation of each person proposed as a trustee, and that he is solvent, and in all other respects a fit, proper and unexceptionable person to be appointed trustee.

- (12). A positive statement that the proposed appointment is expedient and necessary, and is required *bonâ fide* and solely for the benefit of all persons now or hereafter to become interested in the trust property, and without any collusion, fraud, understanding, or agreement that any act or thing shall be done, or omitted, in any manner inconsistent with the due execution of the trusts, or any of them.
 - (13). That no other suit, proceeding or application of any kind is pending, or has been instituted or made, in any Court, or to any judge, for the appointment of a trustee or trustees in the place of the person sought to be removed, or deceased (as the case may be).
 - (14). All matters within the applicant's knowledge, shall be stated positively, and other matters shall be stated expressly from information and belief, and verified by affidavit.
-

In Ireland, AFFIDAVITS must now be prepared in conformity with Sect. 104 of the Chancery Act of 1867, and Nos. 152, 153, 154 and 165, of the General Orders of October, 1867.

Forms of Petitions, &c., will be found in "Reilly's Summary Petitions."

APPENDIX C.

PRECEDENTS.

- No. 1.—Power to appoint new Trustees.*
- 2.—Trustee's Indemnity Clause.*
- 3.—Trustee's Receipt Clause in a Will.*
- 4.—Power to appoint new Trustees of a Will.*
- 5.—Trustee's Indemnity Clause in a Will.*
- 6.—Trustee's Reimbursement Clause.*
- 7.—Appointment of new Trustees of a Will of Real and Personal Estate.*
- 8.—Appointment of new Trustees of a Marriage Settlement (to be endorsed).*
- 9.—Clause supplemental to new Statutory Provisions, specifying how new Trustees to be appointed and giving special Indemnity.*
- 10.—Deed of Disclaimer.*

No. 1.

POWER TO APPOINT NEW TRUSTEES (*a*).

PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto, that if the said trustees hereby constituted or any or either of them, or any future trustee or trustees to be appointed as hereinafter mentioned, shall happen to die or shall go to reside abroad, or shall be desirous of being discharged,

(*a*) This can hardly be considered as necessary, as Lord Cranworth's Act, 23 & 24 Vict. c. 145, imports a similar clause into newly executed deeds, see p. 337, *ante*.

or shall decline or become incapable to act in the trusts or powers herein contained, before the same shall be fully performed or otherwise satisfied, then, and in every such case, it shall be lawful for the said A. B. and C. D. during their joint lives, and after the decease of either of them for the survivor of them, and after the decease of such survivor for the surviving or continuing trustees or trustee for the time being of these presents, or the acting executors or administrators of the last surviving or continuing trustee (and for this purpose a retiring trustee shall, if willing to act in the execution of this power, be considered a continuing trustee), by any deed or deeds, instrument or instruments in writing, to substitute and appoint any other person or persons to be a trustee or trustees in lieu of the trustee or trustees so dying, going to reside abroad, desiring to be discharged, or declining or becoming incapable to act as aforesaid ; and upon every or any such appointment the number of trustees may be augmented or diminished. AND that when any new trustee or trustees shall have been appointed as aforesaid, all the said trust estates, moneys, funds, and securities which shall be then vested in the trustees or trustee for the time being, or in the heirs, executors, or administrators of the last surviving or continuing trustee, shall, if, and so far as the nature of the property and other circumstances shall require or admit, with all convenient speed be conveyed, assigned, transferred and paid, so as effectually to vest the same in the surviving or continuing trustees or trustee, and such new or other trustee or trustees ; or if there shall be no surviving or continuing trustee, then in such new trustees or trustee only ; upon the same trusts as are hereinbefore declared concerning the same, or such of the same trusts as shall be subsisting or capable of taking effect.

AND IT IS HEREBY AGREED AND DECLARED, that every such new trustee shall, as well before as after such transfer of the trust property, in all things act and assist in the management and execution of the trusts and powers to which he shall be so appointed, as effectually and with the same powers, authorities, and discretion, as if he had been originally, by these presents, nominated a trustee for the purposes aforesaid.

No. 2.

TRUSTEE'S INDEMNITY CLAUSE (*a*).

PROVIDED ALSO, and it is hereby agreed and declared by and between the said parties hereto, that the trustees or trustee for the time being of these presents shall be chargeable, respectively, only for such moneys, stocks, funds, and securities as they shall actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall not be answerable or accountable the one for the other or others of them, or for any banker, broker, or other person with whom the said trust moneys, or any part thereof, may be lodged for safe custody, or for the insufficiency or deficiency of any stocks, funds, or securities wherein the same may be invested in pursuance of these presents, nor for dispensing, wholly or in part, with the production or investigation of the lessor's title on lending money on any leasehold security, nor for any defect in title in any hereditaments or premises, on the security whereof the said trust moneys, or any part thereof, may be invested [or which may be purchased under the power for that purpose herein-before contained], nor for any other loss, unless the same shall happen through their own wilful default respectively.

No. 3.

TRUSTEE'S RECEIPT CLAUSE *in a Will.*

(Short Form.)

AND I HEREBY DECLARE that the receipt in writing of the trustees or trustee for the time being, acting in the execution of any of the trusts hereof, for the purchase-money of property sold, or for any moneys, funds, shares, or securities, paid or transferred to them or him in pursuance hereof, or of any of the trusts hereof, shall effectually discharge the purchaser or purchasers, or other the person or persons paying or transferring the same, therefrom, and from

(*a*) This clause is of little, if any, real value; although usually inserted in trust deeds. It does not protect one trustee against the consequences of a breach of trust committed by his co-trustee; and when no breach of trust is committed, the trustee is liable for his own acts and receipts only. This clause is now imported into instruments by the recent Acts. See p. 328 of the text.

being concerned to see to the application, or being answerable for the non-application or misapplication thereof.

No. 4.

POWER TO APPOINT NEW TRUSTEES *in a Will.*

(Short Form.)

AND I HEREBY DECLARE that if the said trustees hereby appointed, or any of them, shall die in my lifetime, or if they or any of them, or any trustee or trustees to be appointed as hereinafter is provided, shall die, or desire to be discharged, or refuse or become incapable to act, then and so often the said trustees or trustee (and for the purpose any retiring trustee shall be considered a trustee), may appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or desiring to be discharged, or refusing or becoming incapable to act; AND upon every such appointment, the said trust premises shall be so transferred, that the same may become vested in the new trustee or trustees, jointly with the surviving or continuing trustees or trustee, or solely, as the case may require; and every such new trustee shall (both before and after the said trust premises shall have become so vested) have the same powers, authorities, and discretion as if he had been hereby originally appointed a trustee (a).

No. 5.

TRUSTEE'S INDEMNITY CLAUSE *in a Will* (b).

(Short Form.)

AND I DECLARE that the trustees or trustee for the time being, of this my will, shall be chargeable only with such moneys as they or he shall actually receive, and shall not be answerable the one for the other of them, nor for any banker, broker, or other person in whose

(a) See note to Precedent No. 2.

(b) See note to Precedent No. 1.

hands any of the trust moneys shall be placed, nor for the insufficiency or deficiency of any stocks, funds, shares, or securities, nor otherwise for involuntary losses.

No. 6.

TRUSTEE'S REIMBURSEMENT CLAUSE (*a*).

AND that the said trustees or trustee for the time being, may reimburse themselves or himself out of the moneys which shall come to their or his hands under the trusts aforesaid, all expenses to be incurred in or about the execution of the aforesaid trusts.

No. 7.

APPOINTMENT OF NEW TRUSTEES

Of a Will of real and personal Estate.

THIS INDENTURE, made, &c., between E. F. and G. H. [surviving trustees] of the first part, and L. M. [new trustee] of the second part : WHEREAS A. B. late of &c. duly made and executed his will, dated the day of , and thereby, after giving divers specific legacies, devised all his real estate unto the said E. F., and G. H., and I. K., their heirs and assigns, upon trusts and with powers thereby declared of the same ; and bequeathed all his personal estate (except chattels real included in the said devise of real estate, and except what he thereby otherwise disposed of) unto the said E. F., G. H., and I. K., their executors, administrators, and assigns, upon trusts and with powers thereby declared of the same ; and devised all the freehold hereditaments vested in him upon mortgage unto the said E. F., G. H., and I. K., their heirs and assigns, subject to the equity of redemption subsisting therein respectively ; and appointed the said E. F., G. H., and I. K. executors of his said will ; and declared that in case the said trustees, &c., [recite the power to appoint new trustees] (*b*). AND WHEREAS the said

(*a*) This clause, although often inserted, is unnecessary, as every trustee is entitled to repayment of the expenses incident to the fulfilment of the trust, without any special direction ; and his right is declared by statute. See p. 265, *ante*.

(*b*) The terms of the power must be strictly followed.

A. B. died, without having revoked or altered his said will, and the same was proved by his said executors in the Court of , on the day of ; AND WHEREAS the said I. K. died in the month of last : NOW THIS INDENTURE WITNESSETH, that they, the said E. F. and G. H., do hereby, in exercise of the aforesaid power, and all other powers enabling them in this behalf, appoint the said L. M. to be a trustee of the said will in the place of the said I. K. : AND THIS INDENTURE ALSO WITNESSETH, that in obedience to the aforesaid direction in this behalf, they, the said E. F. and G. H., do hereby grant unto the said L. M., and his heirs, ALL the said real estate and premises by the said will of the said A. B. devised unto the said E. F., G. H., and I. K., their heirs and assigns, upon trust as aforesaid, with the rights, easements, and appurtenances, and all the estate and interest of them, the said E. F. and G. H. in the premises; TO HOLD the said premises unto the said L. M. and his heirs TO THE USE of the said E. F., G. H., and L. M., their heirs and assigns, UPON THE TRUSTS and with the powers upon and with which the same ought to be held by virtue of the said will. AND THIS INDENTURE ALSO WITNESSETH that, in obedience to the aforesaid direction in this behalf, they, the said E. F. and G. H., do hereby assign unto the said E. F., G. H., and L. M. their executors, administrators, and assigns, all the said personal estate of the said A. B., by the said will bequeathed unto the said E. F., G. H., and I. K., their executors, administrators, and assigns, and now vested in the said E. F. and G. H.: and all the estate and interest of them, the said E. F. and G. H., in the premises, TO HOLD the said premises unto the said E. F., G. H., and L. M., their executors, administrators, and assigns, UPON TRUST forthwith to assign the same unto the said E. F., G. H., and L. M., their executors, administrators, and assigns, upon the trusts and with the powers upon and with which the same ought to be held by virtue of the said will : AND THIS INDENTURE ALSO WITNESSETH, that, in obedience to the aforesaid direction in this behalf, they, the said E. F. and G. H. do hereby grant unto the said L. M. and his heirs, ALL the freehold hereditaments which were vested in the said testator at his death upon mortgage, with their rights, easements, and appurtenances, TO HOLD the said premises unto the said L. M. and his heirs TO THE USE of the said E. F., G. H., and L. M., their

heirs and assigns, subject to the equity of redemption now subsisting therein respectively : AND EACH of them, the said E. F. and G. H., so far as relates to his own acts, doth hereby, for himself, his heirs, executors, and administrators, covenant with the said L. M., his heirs, executors, administrators, and assigns respectively, that they, the said E. F. and G. H., respectively, have not done, or knowingly suffered, anything whereby the said premises, hereby granted and assigned respectively, or any part thereof, are, is, or can be impeached, incumbered, or affected in title or otherwise. IN WITNESS, &c. (a).

No. 8.

**APPOINTMENT OF NEW TRUSTEES OF A MARRIAGE
SETTLEMENT.**

(To be endorsed on the Settlement.)

THIS INDENTURE, made, &c., BETWEEN the within named A. B. and C. B., his wife (at the date and execution of the within written Indenture, the within named C. D., spinster) [*husband and wife, donees of the power (b)*] of the first part, the within named G. H. [*retiring trustee*] of the second part, and I. K., of &c., and L. M., of &c. [*new trustees*] of the third part: WHEREAS the marriage in the within written Indenture said to be intended, was solemnized shortly after the date thereof: AND WHEREAS the within named E. F. is dead, and the said G. H. desires to be discharged from the trusts of the within written Indenture: NOW THIS INDENTURE WITNESSETH that they, the said A. B. and C. B., do hereby, in exercise of the power in that behalf in the within written Indenture contained, appoint the said I. K. and L. M., respectively, to be trustees of the within written Indenture in the place of the said E. F. and G. H., respectively: AND IT IS HEREBY DECLARED that the said I. K. and L. M., their executors, administrators, and assigns,

(a) It was formerly necessary to assign by one deed to a provisional trustee, who by a second deed reassigned. But sect. 21 of stat. 22 & 23 Vict. c. 35, enables any person to assign personal property *directly to himself and another or other persons*.

(b) If the power of making a new appointment be not conferred upon them, the form will be altered accordingly ; in executing the power, its terms must be strictly followed.

shall hold the within mentioned sum of £ ——, Bank Annuities, which is intended to be transferred into their names immediately after the execution of these presents (a), and the annual income thereof, UPON the trusts, and subject to the powers, upon and subject to which the same ought to be held by virtue of the within written Indenture (b).

No. 9.

Clause specifying by whom new Trustees are to be appointed and giving special Indemnity, as supplemental to Statutory Provisions (c).

AND IT IS hereby agreed and declared that the power of appointing a new trustee or trustees of these presents, in the place of any trustee or trustees who shall die, or desire to be discharged, or refuse or become unfit or incapable to act, shall be exercisable by the said [] and [] during their joint lives, and by the survivor of them during the life of such survivor, and after the death of such survivor by the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, administrators or administrator, of the last surviving and continuing trustee or by the last retiring trustees or trustee ; and upon every or any such appointment the number of trustees may be augmented or reduced ; and (in addition to the ordinary indemnity and right to reimbursement by law given to trustees) the trustees for the time being of these presents shall be at liberty to dispense, wholly or partially, with the investigation or production of the lessor's title on lending money on leasehold securities, or otherwise to lend on any security with less than a marketable title, and shall not be answerable for any loss thereby occasioned.

(a) Care must be taken that the transfer is duly made. See p. 112.

(b) If there have been any dealings with the trust property since the date of the settlement, they must be stated, so as to show the funds now subject to the settlement.

(c) Suggested, 3 Davidson's Precedents (2nd ed.), p. 565, to meet the case where the receipt clause and other clauses not actually necessary are omitted, and it is only desired to specify by whom new trustees are to be appointed, and to supplement the statutory provisions as to indemnity.

No. 10.

DEED OF DISCLAIMER,

*By a person named as TRUSTEE and EXECUTOR of a Will, and
Guardian of the Testator's Children (a).*

TO ALL TO WHOM these presents shall come, E. F., of &c., sendeth greeting : WHEREAS [*Here recite the will of the testator, stating briefly the devises, and more particularly the devise of the estate, &c., in trust, also the appointment of the executors and guardians of the testator's children*] : AND WHEREAS the said A. B. died, on the day of without having in anywise revoked or altered his said will, and the same was proved by [the other executor] on the day of in the Court of , the said E. F. having first duly renounced probate of the same ; AND WHEREAS the said E. F. has in no wise administered to the estate of the said testator, and has in no wise acted or interfered in the execution of the trusts of the said will or any of them, or as guardian of the children of the said testator, and has declined to administer to the estate of the said testator, or to act or interfere in the execution of the trusts of the said will, or as guardian of the said children : NOW THESE PRESENTS WITNESS that he, the said E. F., hath renounced and disclaimed, and by these presents doth renounce and disclaim ALL and singular the said freehold and leasehold messuages [&c.] and all and singular other the real and personal estate and effects whatsoever given, devised, or bequeathed by the said will, and all devises, bequests, and legacies, expressed to be made or given to him, whether alone or jointly with any other person or persons by the said will, and also the said offices of trustee and executor of the said will, and guardian of the children of the said testator, and all and singular trusts, powers, and authorities whatsoever under the said will. IN WITNESS, &c.

(a) It has been before stated (Chapter I.) that a trustee who has once accepted or acted in the trust is not at liberty to disclaim ; and that a person who resolves not to accept the office should forthwith evidence his refusal by a deed of disclaimer.

The disclaimer should not affect to convey the estate, for it is doubtful whether such conveyance would not *per se* evidence an acceptance of the trust, 5 Martin's Conv. by Davidson, 607, 610.

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